No. _____

In The

Supreme Court of the United States

DAVID ARNAL,

Petitioner,

v.

LAURA LAWTON FRASER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the decision of the Supreme Court of South Carolina holding that South Carolina is not prohibited from exercising subject matter jurisdiction to modify its child custody decree conflict with the federal Parental Kidnapping Prevention Act, 28 U.S.C. §1738A ("PKPA"), where neither of the parties nor the child remained residents of South Carolina when the underlying action was commenced?

   A. Does the decision of the Supreme Court of South Carolina that a visitation modification action does not constitute a child custody dispute to which the PKPA applies conflict with the provisions of the PKPA?

   B. Does the decision of the South Carolina Supreme Court that this action does not involve an interstate custody dispute conflict with the provisions of the PKPA where the parties and child resided in states other than South Carolina and where an action concerning custody of the child was also pending in North Carolina?

II. Does the decision of the Supreme Court of South Carolina failing to hold that South Carolina lacks subject matter jurisdiction to modify its child support order conflict with the federal Full Faith and Credit for Child Support Orders Act, 28 U.S.C. §1738B ("FFCCSOA"), where neither of the parties nor the child were residents of South Carolina when the underlying action was commenced?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the Parties to the Proceeding are:

DAVID ARNAL, an individual;

LAURA LAWTON FRASER, an individual.

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CITATION OF REPORT OF OPINION ENTERED IN THE CASE

David Arnal v. Laura Lawton Fraser, 371 S.C. 512, 641 S.E.2d 419 (2007).

BASIS FOR SUPREME COURT JURISDICTION

The Supreme Court of South Carolina entered its opinion on January 22, 2007 and subsequently denied a timely petition for rehearing on March 7, 2007. The court remitted the case to the trial court on March 7, 2007. (App. 1-12, 63-64). The present Petition is timely filed under 28 U.S.C. §2101(c) and under Rules 13.1 and 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. §1257(a) to review on writ of certiorari the final judgment rendered by the highest court of a State in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed under the statutes and Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED IN THE CASE

Constitution of the United States, Article VI, cl. 2 the Supremacy Clause.

The Parental Kidnapping Prevention Act, 28 U.S.C. §1738A ("PKPA"), particularly subsection (d) concerning continuing jurisdiction which provides:

> The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be

> met and such State remains the residence of the child or of any contestant.

28 U.S.C. §1738A(d).

Full Faith and Credit for Child Support Orders Act, 28 U.S.C. §1738B ("FFCCSOA"), particularly subsection (d) concerning continuing jurisdiction which provides, in pertinent part:

> A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant. . . .

28 U.S.C. §1738B(d).

STATEMENT OF THE CASE

This is a child custody and support modification case involving a truly intractable jurisdictional deadlock which needs to be reviewed and resolved by this Court. The Supreme Court of South Carolina decided important federal questions which conflict with the PKPA and FFCCSOA. Resolution of the questions presented here will help ensure state court compliance with the provisions of the PKPA and FFCCSOA to avoid the types of jurisdictional conflicts in child custody and support cases that these federal Acts were intended to prevent. Interpreting the provisions of the PKPA, this Court stated in *Thompson v. Thompson*, 484 U.S. 174, 187 (1988), that "ultimate review remains available in this Court for truly intractable jurisdictional deadlocks."

The Petitioner, David Arnal (Father), and the Respondent, Laura Lawton Fraser (Mother), formerly were husband and wife having been divorced by the Amended Final Order of the South Carolina family court filed on

October 17, 2001 in Beaufort County. The Amended Final Order disposed of all other issues arising from the parties' marriage, including granting custody of their minor child, Samuel Arnal, born with Down Syndrome on July 7, 1999 (Child) to the Mother and visitation to the Father and obligating the Father to pay child support. The order gave the Mother complete authority over all matters concerning the Child's care. (App. 37-62).

Both parties lived in Beaufort County, South Carolina when the divorce action was filed in 1999. In January 2000, before the parties were divorced by the Amended Final Order in 2001, the Mother and Child moved from South Carolina to Brevard, North Carolina where they continued to reside until at least 2006. The Father moved from South Carolina to Georgia in 2002 where he has lived ever since.

The Father filed the present action in 2003 in the Beaufort County, South Carolina family court, seeking modification of the visitation and support provisions of the Amended Final Order, specifically modifying his child support obligation and authorizing him to carry health insurance on the Child, changing the designated location for visitation exchanges, and permitting him to have the Child examined by independent medical professionals. (App. 67-71).

The Mother counterclaimed also seeking to modify the visitation and support provisions of the Amended Final Order by restricting or supervising and imposing various requirements upon or suspending the Father's visitation. The Mother also sought an increase in the Father's child support obligation and an order requiring the Father to pay the costs of an intensive vitamin and supplement

regimen, (App. 72-78), imposed by the Mother on their Down Syndrome child which the Father's experts contend is without any proven beneficial result and is potentially dangerous and harmful to the Child.

Neither party nor the Child were residents of the State of South Carolina when this modification action was commenced on February 10, 2003. In fact, at a hearing held on the very day this action was commenced, the Mother testified that she was a resident of North Carolina, and the Father testified that he was a resident of Georgia. (App. 65-66).

The Mother filed a motion to terminate the Father's overnight visitation in July 2004 for his alleged failure to administer vitamin and supplement administrations as she instructed, having previously secured an order of the family court requiring the Father to videotape all administrations. Simultaneously, the Mother filed a rule to show cause alleging that the Father was not videotaping properly and the Father was not administering the vitamins and supplements correctly. The Mother sought to have the Father incarcerated as she had done repeatedly since 2000.

At an August 2004 hearing, the family court suspended the Father's overnight visitation privileges for not videotaping each and every vitamin administration properly, up to ten per day, in front of a cable television station displaying the date and time when the Father could not afford cable television and for not administering the Child's vitamins in almond milk, which the Child spat out, but instead administering them in almond butter or Polaner's jelly that the minor Child would take and was acceptable based on dietary restrictions imposed by the

Mother. The Father appealed this order to the South Carolina Court of Appeals. (App. 13-21).

At an October 2004 hearing the Father was required to pay for the vitamins and minerals, nutritional supplements and alternative medicine treatments. The Father appealed this order to the South Carolina Court of Appeals. (App. 22-25).

After four days of testimony in March and April 2005, the family court found the Father in contempt and sentenced him to jail for not videotaping properly, not administering the vitamins and supplements correctly and not paying for the vitamins and supplements, with the ability to purge by properly videotaping the administrations. The order provided that if the Father failed to provide the required video to the Mother on any occasion within the following twelve months, a warrant would be issued for his arrest and he would be incarcerated for up to six months for failing to meet the conditions to purge the contempt by production of the video required and not produced. The Father appealed this order to the South Carolina Court of Appeals. (App. 26-33).

On July 26, 2006 the Mother filed an affidavit alleging that the Father had once again not met all of the requirements of the videotaping order and asked that the Father be incarcerated. On the basis of the Mother's affidavit and without a hearing, the family court issued an *ex parte* order and bench warrant for the Father's arrest. The Father appealed this *ex parte* order and bench warrant to the South Carolina Court of Appeals on August 7, 2006. (App. 34-36).

On August 15, 2006 the Father filed a petition for an expedited *ex parte* writ of supersedeas to the South Carolina Court of Appeals seeking to stay enforcement of the

ex parte order and bench warrant for the Father's arrest and other orders on the grounds that South Carolina lacked continuing subject matter jurisdiction under the federal Parental Kidnapping Prevention Act, 28 U.S.C. §1738A ("PKPA") and the South Carolina Uniform Child Custody Jurisdiction Act ("UCCJA"). The Father asserted the court lacked jurisdiction to issue the orders on appeal since none of the contestants were South Carolina residents when the action started. The same day, on August 15, 2006, the Court of Appeals issued an order granting a temporary stay and requesting the Supreme Court of South Carolina certify the case for its review.

The Supreme Court of South Carolina issued an order on September 7, 2006 granting the Court of Appeals' motion to certify the case and consolidating all of the pending appeals. On October 31, 2006, the Father filed an action in North Carolina to register the South Carolina Amended Final Order for modification and enforcement purposes, asserting that North Carolina had jurisdiction under the PKPA and other applicable law.

The Supreme Court of South Carolina issued its opinion on January 22, 2007 stating:

> Father contends that the UCCJA and PKPA prohibit the Beaufort County family court from exercising subject matter jurisdiction over the current modification action. He argues that all orders should be voided and vacated because, by the time this action was filed in February 2003, Father had moved to Georgia while Mother and Samuel [the Child] lived in North Carolina. We disagree.
>
> Both the PKPA and UCCJA govern jurisdictional disputes between courts of different states when multiple states claim jurisdiction over a custody or child visitation dispute. [Footnote

> omitted.] In this case, however, no other state is competing with South Carolina for jurisdiction, and the current action does not include a child custody dispute. Instead, both parties rely on a Court of Appeals decision which addressed subject matter jurisdiction under the PKPA and UCCJA in a situation similar to the present case, i.e., neither parents nor child resided in South Carolina and no other state was competing for jurisdiction. *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620, S.E.2d 333 (Ct. App. 2005). However, *Widdicombe* only addressed custody, whereas custody has never been an issue in this case. . . .

(App. 5-6). Accordingly, the Supreme Court of South Carolina held the PKPA and UCCJA inapplicable, finding that no other state was competing for South Carolina for jurisdiction and that the case did not involve a child custody dispute subject to the Acts.

On March 7, 2007, the South Carolina Supreme Court denied timely petitions for rehearing filed by both parties and remitted the case to the trial court.

This Petition follows.

ARGUMENTS

I. The decision of the Supreme Court of South Carolina holding that South Carolina is not prohibited from exercising subject matter jurisdiction over this child custody modification action conflicts with the federal Parental Kidnapping Prevention Act, 28 U.S.C. §1738A ("PKPA"), because neither of the parties nor the child remained residents of South Carolina when the underlying action was commenced.

Both the PKPA and the Uniform Child Custody Jurisdiction Act, S.C. Code Ann. §§20-7-782 to -830 ("UCCJA")

govern the *subject matter* jurisdiction [not personal jurisdiction] of state courts to rule in interstate custody disputes. Because the PKPA is federal legislation, its provisions govern any conflict between it and the UCCJA (South Carolina's jurisdictional statute for interstate custody decrees). U.S. Const. art. VI, cl. 2 (the Supremacy Clause of the United States Constitution); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 86, 620 S.E.2d 333, 339 (Ct. App. 2005), *cert. pending* (internal citations omitted) (emphasis added); *Clay v. Burckle*, 369 S.C. 651, 656, 633 S.E.2d 173, 176 (Ct. App. 2006).

The provisions of the PKPA which address continuing jurisdiction are contained in subsection (d) of 28 U.S.C. §1738A and provide as follows:

> The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Subsection (c)(1) mentioned in the above quotation requires that the family court maintain jurisdiction under its own state law. *Widdicombe*, 366 S.C. at 86, 620 S.E.2d at 339.

Therefore, the PKPA sets forth three requirements, all of which must be met, for a court to retain continuing jurisdiction and modify its original custody decree, to wit:

1) that the original custody determination was entered consistently with the provisions of the PKPA;
2) that the court maintain jurisdiction under its own state law (in South Carolina, the UCCJA); and

3) that the state remains the residence of the child or of any contestant.

Id. at 86, 620 S.E.2d at 339; *Burckle*, 369 S.C. at 656, 633 S.E.2d at 176.

The first requirement, that the original custody decree was entered consistently with the PKPA, requires an application of the PKPA jurisdictional statute which provides that a custody or visitation determination made by a state is consistent with the PKPA if the state has jurisdiction under its own law (in South Carolina, the UCCJA) and, among other grounds, such state is the "home state" of the child on the date of the commencement of the proceeding. 28 U.S.C. §1738A(c). Throughout the PKPA, and the UCCJA for that matter, initial jurisdictional requirements are discussed in terms of the child's "home state." The term "home state" is defined in the PKPA as "the state in which, immediately preceding the time involved [the date of the commencement of the action], the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months. . . ." 28 U.S.C. §1738A(b)(4); *see also* S.C. Code Ann. §20-7-786(5) (likewise defining the term "home state" under the UCCJA). This language provides a court with clear standards governing its jurisdiction over a custody dispute in which there is no previous custody decree. *Widdicombe*, 366 S.C. at 89, 620 S.E.2d at 340.

Applying the first requirement of the PKPA to the present case requires a determination as to whether the Amended Final Order, the original custody decree of the Beaufort County, South Carolina family court, was entered consistently with the provisions of the PKPA. Since South Carolina was the "home state" of the parties' minor Child when the initial custody action was commenced, both

parties and the Child having been residents of South Carolina for at least six consecutive months before their divorce litigation was filed, the jurisdictional requirements of both the PKPA and UCCJA were satisfied in that action. Therefore, the first requirement of the PKPA was met.

The second requirement, that the court seeking to modify a custody decree maintain jurisdiction under its own state law (in South Carolina, the UCCJA), requires an application of the UCCJA jurisdictional statute. Under the UCCJA, a South Carolina family court has continuing jurisdiction to modify a custody decree if this State is the "home state" of the child. S.C. Code Ann. §20-7-788(a)(1) (1985). Even if South Carolina is not the "home state" of the child and the child is not physically present in the State, the UCCJA permits a South Carolina court to modify a custody decree, among other grounds, if:

> it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships. . . .

S.C. Code Ann. §20-7-788(a)(2); *Widdicombe*, 366 S.C. at 87, 620 S.E.2d at 339.

Therefore, the issuing state may not exercise continuing jurisdiction if there is no longer a sufficient connection of the child and at least one parent with the issuing state or if there is insufficient evidence of the child's present or future care in the issuing state. *See Sinclair v. Albrecht*, 287 S.C. 20, 23, 336 S.E.2d 485, 488 (Ct. App. 1985) ("[c]onnection with the decree state ends if all the parties involved have moved away or contact with the decree state

has otherwise become slight"). Furthermore, the question of whether the issuing state retains continuing jurisdiction to modify its pre-existing custody decree is determined at the time when the modification action is filed. *See, e.g., Albrecht*, 287 S.C. at 22, 336 S.E.2d at 487; *Minneapolis & St. L. R.R. v. Peoria & P. U. Ry.*, 270 U.S. 580 (1926) (jurisdiction is determined as of time suit is begun).

Applying the second requirement of the PKPA to the present case requires a determination as to whether it was in the best interest of the minor Child for the family court to retain jurisdiction under the UCCJA because when this action was commenced the Child and at least one of the parties had a significant connection with this State and substantial evidence concerning the Child's present or future care, protection, training and personal relationships was available in South Carolina. Over three years before the present action was commenced on February 10, 2003, the Mother and the Child moved from South Carolina to Brevard, North Carolina. The Amended Final Order filed on October 17, 2001 in the parties' divorce action states:

> The Mother is a citizen and resident of the County of Transylvania, North Carolina. The Mother is a beneficiary of an intervivos trust which purchased a home in Brevard, North Carolina, in 1999. As set forth and contemplated by the Court in the pendente lite order issued after the hearing on January 5, 2000, the Mother and the minor child of the parties moved approximately two weeks after the hearing to the home in Brevard, North Carolina, and have been living there since that time.

(App. 42). Therefore, the Mother and the Child permanently moved from South Carolina to North Carolina in January of 2000 and continued living in North Carolina

until the parties' divorce action became final upon issuance of the Amended Final Order in October 2001.

Numerous contempt pleadings, exhibits and other evidence filed in the parties' divorce action after October of 2001 demonstrate that the Mother and Child continued to reside in North Carolina through the time when this action was commenced on February 10, 2003. (App. 65-66). The Mother admitted in an affidavit dated September 29, 2006 that she and the Child were not domiciled in South Carolina for over three and one-half years before the present action was commenced. The initial temporary hearing in this action was held on August 11, 2003. A consent order of the same date refers to the Mother's home in Brevard, North Carolina, and the Mother's financial declaration lists her home and work address in Brevard, North Carolina.

Although the Mother and Child moved temporarily from North Carolina to Hilton Head Island, South Carolina, in August of 2004 so that the minor Child could attend the Sea Pines Montessori School, this temporary move occurred after the action was commenced and cannot form the basis for the family court to exercise continuing jurisdiction since the question of jurisdiction is determined as of the date when the action is commenced.

In her most recent pleading dated April 14, 2006, the Mother represented that her primary residence was still located in North Carolina stating: "Defendant [Mother] and Samuel [the Child] have moved temporarily to Hilton Head Island. . . ." and "[a]ll of the Plaintiff's [Father's] future visitation with Samuel [the Child] should take place on Hilton Head (or Brevard, North Carolina, once the Defendant [Mother] and minor child return to

Brevard). . . ." (App. 74 and 76). Therefore, the Mother and the Child continued to reside in North Carolina up until at least 2006.

The Mother claimed to reside in North Carolina until the Father filed his petition for an expedited *ex parte* petition for a writ of supersedeas to the South Carolina Court of Appeals on August 15, 2006 raising the lack of subject matter jurisdiction based on the domicile of the parties when the action was commenced. For the first time on August 26, 2006, in her return to the Father's petition for a writ of supersedeas, the Mother dubiously took the position that her move to *North Carolina* was temporary and that she had always been a South Carolina resident.

There is an abundance of evidence that the Father had not resided in South Carolina for over seven months before the instant action including testimony that he was a Georgia resident when the action was commenced on February 10, 2003. (App. 66). The Father left South Carolina permanently on July 4, 2002 when he moved in with his fiancé in Savannah, Georgia. The Father and his fiancé were married on August 18, 2002 and continued living together in Savannah. The Father obtained a new job in Atlanta, Georgia in February of 2003. In his complaint in this action seeking *inter alia* to change the visitation exchange location, the Father stated: "Plaintiff's [Father's] new job will entail his moving to Atlanta, Georgia." On February 24, 2003, the Father moved from Savannah to Atlanta, Georgia, to start his new job and lived with friends in Lawrenceville, Georgia. In October 2003 the Father and his wife moved to Marietta, Georgia, and the Father has continued to reside in Georgia ever since.

Because both parties and the Child had left South Carolina before this action was commenced, the Mother and Child having left over three years beforehand, neither the Child nor either party had any significant connection with South Carolina, and insufficient evidence of the Child's present or future care, protection, training and personal relationships existed in South Carolina when this action was commenced. The only connections that either party and the Child had with South Carolina, and the only evidence of the Child's care in South Carolina when the present action was commenced consisted of the following: (1) only one of the Child's many doctors was located in South Carolina; (2) the Child's paternal grandparents lived on Hilton Head Island in South Carolina; (3) the Father maintained an office on Hilton Head Island; and (4) the parties' previous divorce action which was no longer pending at the time of the present action took place in South Carolina.

North Carolina clearly was the state with which the Mother and Child had the most significant connection and in which there was substantial evidence concerning the Child's present or future care, protection, training and personal relationships when this action was commenced. The Mother's permanent residence and mailing address, employer, church and her mother were all located in North Carolina, and the Mother's driver's license was issued in North Carolina. The Child's permanent residence, primary care pediatrician and most other doctors including his chiropractor and therapists, his school and educational tutors were all located in North Carolina when the action commenced, and North Carolina was the location of the Father's visitation with the Child from January 2000 through February 2003.

Based on the foregoing, the second requirement of the PKPA was not met since South Carolina lacked continuing jurisdiction to modify visitation under the UCCJA where the Child and at least one party did not have a significant connection with South Carolina and where there was insufficient evidence of the Child's present or future care, protection, training and personal relationships in South Carolina when this action was commenced.

The third requirement of the PKPA requires that the state seeking to modify a custody decree remains the residence of the child or of any contestant. No similar requirement is found in the UCCJA. Unlike the UCCJA, the PKPA expressly mandates that at least the child or one of the contestants remains a resident of the decree state for that state to exercise continuing jurisdiction. As previously noted, when the provisions of the federal PKPA and state UCCJA conflict, the PKPA controls under U.S. Const. art. VI, cl. 2, the Supremacy Clause of the United States Constitution. *Widdicombe*, 366 S.C. at 88, 620 S.E.2d at 340.

As the Court in *Widdicombe* pointed out, rather than employing the expressly defined term "home state," the PKPA sets forth a requirement of "residence" when discussing a court's continuing jurisdiction over custody matters. Because the term "residence" is not defined in the PKPA, the determination of whether a decree state has lost its continuing jurisdiction turns on the question of the parties' or child's domicile. "Domicile is the place of one's true, fixed, and permanent home and principal residence, to which one has the intention of returning after an absence therefrom. . . . The question of a person's place of residence is largely one of intent to be determined under the facts and circumstances of each case. The act and

intent as to domicile, not the duration of the residence, are the determining factors." *Widdicombe*, 366 S.C. at 89, 620 S.E.2d at 340-41 (internal citations omitted).

Even assuming that the second requirement of the PKPA was met in the present case, the third requirement clearly was *not* met because neither party nor the Child remained a resident of South Carolina when this action was commenced on February 10, 2003. As previously stated, the Mother and the Child were residents of North Carolina, and the Father was a resident of Georgia, when this action was commenced. (App. 65-66). Since all three requirements under the PKPA were not met in this action, the family court lacks continuing exclusive jurisdiction to modify the child custody or visitation provisions of its Amended Final Order.

A. The decision of the Supreme Court of South Carolina that a visitation modification action does not constitute a child custody dispute to which the PKPA would apply conflicts with the provisions of the PKPA.

While this case does not involve a traditional custody contest, it does involve a visitation dispute which clearly is subject to the provisions of the PKPA. The PKPA actually contains a separate definition of what constitutes a "visitation determination" subject to the Act. Under the PKPA a "'visitation determination' means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications." 28 U.S.C. §1738A(b)(9). The

PKPA applies to related issues of visitation as well as to interstate enforcement and modification of child custody decrees. *Matthews v. Riley*, 649 A.2d 231 (Vt. 1994). Visitation is within the meaning of the statutes relating to filing and enforcement of custody decrees. *Sharp v. Sharp*, 518 N.W.2d 254 (Wis. Ct. App. 1994).

The present case certainly involves a "visitation determination" as that term is defined in the PKPA. Both parties in this case are seeking to modify the Father's visitation rights provided in the Amended Final Order of the family court which was the initial custody decree. In his complaint, the Father seeks to modify the custody and visitation provisions of the Amended Final Order to enable him to have the Child examined by a doctor of his choosing and seeks to change the visitation exchange location. (App. 68-71). In her original and two amended and supplemental answer and counterclaims, the Mother seeks to modify the Amended Final Order by reducing and restricting the Father's visitation with the Child. (App. 72-78).

Therefore, the PKPA is applicable to this case for visitation modification, and the Supreme Court of South Carolina erred in distinguishing *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005), *cert. pending*, from the present case on the basis that *Widdicombe* involved a dispute over custody which was lacking in this case.

B. The decision of the Supreme Court of South Carolina that this action does not involve an interstate custody dispute conflicts with the provisions of the PKPA where the parties and child resided in states other than South Carolina and where an action concerning custody of the child was also pending in North Carolina.

Actual jurisdictional competition between different states over a custody dispute or even the existence of orders issued by different states concerning the same child are not prerequisites for application of the jurisdictional provisions of the PKPA and UCCJA. Notwithstanding, this case does involve a multistate jurisdictional conflict or, at the very least, an interstate custody dispute.

There is no question that the PKPA and UCCJA govern jurisdictional disputes between courts of different states claiming jurisdiction over the same child custody or visitation determination. The PKPA and UCCJA, however, were not enacted merely to *resolve* multistate jurisdictional conflicts but also to *prevent* them from occurring in the first place.

As the legislative scheme suggests, and as Congress explicitly specified, one of the chief purposes of the PKPA is to "avoid jurisdictional competition and conflict between State courts." Pub. L. 96-611, 94 Stat. 3569, 7(c)(5), note following 28 U.S.C. §1738A; *Thompson v. Thompson*, 484 U.S. 174, 177 (1988). Similarly, one of the main purposes of the UCCJA is to "avoid jurisdictional competition and conflict with courts of other states. . . ." S.C. Code Ann. §20-7-784(a)(1) (1985); *see also Kirylik v. Kirylik*, 292 S.C. 475, 477, 357 S.E.2d 449, 450 (1987) (stating that the UCCJA was enacted to *prevent the potential of* conflicting

custody decrees being entered by two different states) (emphasis added).

The jurisdictional standards contained in the PKPA and UCCJA supply the means both to avoid and to resolve multi-state jurisdictional conflicts if they occur by providing clear guidance as to the proper state to exercise jurisdiction over any given child custody or visitation dispute. Application of the jurisdictional criteria of the PKPA and UCCJA to such disputes is mandatory even in the absence of different states competing for jurisdiction or the existence of orders from more than one state because there simply is no statutory language contained in the PKPA or UCCJA expressly restricting their applicability to those particular situations.

Filing a custody or visitation action in a state which has jurisdiction consistent with the mandates of the PKPA and UCCJA lessens the likelihood that a multi-state jurisdictional conflict will arise thereby serving the purpose of the Acts to prevent interstate custody disputes. Therefore, the jurisdictional provisions of the PKPA and UCCJA apply even in the absence of different states competing for jurisdiction or conflicting custody orders issued by different states. Indeed, one of the chief aims of the PKPA and UCCJA in deterring multi-state jurisdictional conflicts would not be served if the Acts were only given application once an actual conflict occurred.

At its threshold the PKPA sanctions the jurisdiction of a state court to make a child custody or visitation determination only if the state has jurisdiction under its own local law (in South Carolina, the UCCJA) and the state meets one of five conditions set out in Section 1738A(c)(2). These conditions authorize a state court to enter a custody decree if *inter alia* the state is the "home state" of the child

or it would be in the child's best interest for the state to assume jurisdiction because the child and at least one contestant have a significant connection with the state and there is substantial evidence concerning the child in the state. 28 U.S.C. §1738A(c); *Thompson v. Thompson*, 484 U.S. 174, 176-77 (1988). The jurisdictional conditions of the PKPA demonstrate the purpose of the PKPA in assuring that the state with the closest connection to the child and family exercise jurisdiction over any given custody or visitation action. The UCCJA contains nearly identical threshold jurisdictional requirements as the PKPA. *See* S.C. Code Ann. §20-7-788.

A critical difference between the PKPA and UCCJA, however, is the limitation imposed by the PKPA upon the ability of a court to exercise continuing jurisdiction over a custody or visitation matter. Subsection (d) of section 1738A expressly provides that a state which has made a custody or visitation determination consistent with the PKPA continues only so long as such state remains the residence of the child or of any contestant. 28 U.S.C. §1738A(d). Therefore, once the child and all contestants have left the issuing state, the continuing jurisdiction of the issuing state to modify its decree automatically terminates which serves the purpose of assuring that only the state with the closest connection to the family exercises jurisdiction. This clear "bright-line" test for determining whether a decree state has lost its continuing jurisdiction has no equivalent counterpart in the UCCJA. Because the PKPA is federal legislation, its provisions govern any conflict between it and the UCCJA. U.S. Const. art. VI, cl. 2 (the Supremacy Clause of the United States Constitution). Therefore, this "bright-line" test under the PKPA must control the determination of whether a decree state has lost its continuing jurisdiction.

Although there are no South Carolina cases explicitly applying the "bright-line" test under the PKPA for determining whether the decree state has lost its continuing jurisdiction, the South Carolina Court of Appeals appears to have applied the test in *Sinclair v. Albrecht*, 287 S.C. 20, 336 S.E.2d 485 (Ct. App. 1985). While not citing the PKPA, the court held that the "[c]onnection with the decree state ends if all the parties involved have moved away *or* contact with the decree state has otherwise become slight. [Citations omitted]. Even if the state has continuing jurisdiction under local law, it has lost *interstate* jurisdiction." *Albrecht*, 287 S.C. at 23-24, 336 S.E.2d at 488 (Ct. App. 1985).

Cases from other jurisdictions further illustrate this principle. In *Dahlen v. Dahlen*, 393 N.W.2d 769 (N.D. 1986), the court held that pursuant to 28 U.S.C. §1738A(d), the "bright-line" test for determining continuing jurisdiction, North Dakota no longer had jurisdiction to modify its original custody decree awarding custody to the mother since North Dakota was no longer the residence of either the children or the parents. After the initial decree was rendered in North Dakota, the mother and children moved to California, and the father moved to Minnesota. When the father filed for modification of the original decree in North Dakota, the mother and children had been living in California for over two years, and the father had been living in Minnesota for at least fourteen months. Despite the fact that no litigation concerning the children had been filed in any state except for North Dakota, the court held that the case involved an interstate custody dispute and the residency requirement of §1738A(d) was dispositive of the jurisdictional issue.

In *Holloway v. Holloway*, 519 So.2d 531 (Ala. Ct. App. 1987), the court upheld dismissal of the father's petition filed in Alabama to modify a previous custody decision of that state since the trial court lacked continuing jurisdiction under 28 U.S.C. §1738A(d) where there was no evidence that either the father, the mother or the children still resided in Alabama. To the contrary, there was evidence that for five years preceding the modification petition, the children had either lived with the father in Georgia, Mississippi or Florida, or with the mother in Oregon. *See also Ex parte Carstens*, 728 So.2d 128 (Ala. 1998) (holding that under the UCCJA, continuing jurisdiction to modify a custody judgment was lost when the child and both parents removed themselves from the state where the judgment was rendered).

In *Haydon v. Darrough*, 961 S.W.2d 940 (Mo. Ct. App. 1998), on the father's motion for contempt alleging that the mother had failed to comply with the visitation schedule, a Missouri trial court did not have continuing jurisdiction under the UCCJA to modify its child custody order entered in the parties' divorce action since the mother and child had relocated to Virginia nearly one year before the motion and the father lived in Indiana.

In *Beddow v. Beddow*, 556 N.Y.S.2d 780 (1990), the court held that New York did not have continuing jurisdiction to decide a visitation action brought by the father because New York was no longer the residence of the children or either parent. Even though the marital domicile was in New York and the children were born and lived in New York, the children had been residing in Maine with their mother for eighteen months and the father resided in New Jersey at the time of commencement of the action.

In *Stambolija v. Stambolija*, 643 N.E.2d 5 (Ind. Ct. App. 1994), the father was granted custody of the children upon the parties' divorce in Indiana in 1988. In 1989, the father moved with the children to Michigan. The mother exercised visitation with the children until her death in 1993, whereupon the maternal grandparents filed a petition in Indiana for visitation rights with the children which was granted. The court held that while the UCCJA governed inasmuch as visitation rights are considered a custody matter, the trial court abused its discretion in exercising jurisdiction since the child and parties had left Indiana.

In *Re Cifarelli*, 611 A.2d 394 (Vt. 1992), both parents were killed when their child was five months old. The child's maternal grandmother filed a petition for guardianship of the child and was granted temporary custody in Vermont and then took the child to live with her in Bermuda. The paternal grandmother filed an action in Vermont seeking visitation with the child. However, Vermont did not have continuing jurisdiction to entertain the action for visitation since the paternal grandmother was a resident of Connecticut and the child had lived in Bermuda for thirteen months.

In *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005), the South Carolina Court of Appeals applied the jurisdictional conditions of the PKPA and UCCJA to determine whether South Carolina was the proper state to exercise jurisdiction over the custody dispute despite the absence of any other state competing for jurisdiction and despite the fact that South Carolina was the only state in which litigation had ever been pending concerning the child. Because the father was an Illinois resident and the mother and child had lived in

South Carolina and North Carolina, the Court found the case involved an interstate custody dispute subject to the provisions of the PKPA and UCCJA.

The foregoing authorities illustrate that the parties involved in a custody determination need only live in different states for the controversy to qualify as an interstate custody dispute governed by the PKPA and UCCJA. The parties to the present action live in different states. When this action was commenced, the Mother and Child lived in North Carolina, and the Father lived in Georgia. (App. 65-66). Therefore, the provisions of the UCCJA and PKPA, particularly the "bright-line" test of section §1738A(d) of the PKPA for determining continuing jurisdiction, apply. Since neither the Father nor the Mother or Child remained residents of South Carolina when this action was commenced, South Carolina had lost its continuing jurisdiction to modify the Amended Final Order.

Even assuming that application of the UCCJA and PKPA jurisdictional requirements hinges upon the existence of an actual jurisdictional conflict between different states competing for jurisdiction over the same controversy, which would be contrary to the intent of the Acts in avoiding such multi-state jurisdictional conflicts, the action filed by the Father in North Carolina claiming that North Carolina has jurisdiction to modify and enforce the Amended Final Order of the South Carolina family court satisfies that requirement. (App. 79-84).

Because the parties and the Child lived in states other than South Carolina, the state which issued the Amended Final Order or initial custody decree, when this action was commenced, and since the Father had filed litigation in

North Carolina to modify the Amended Final Order, this action involves an interstate custody dispute which is subject to the provisions of the PKPA. Moreover, since neither the Child nor either of the parties remained residents of South Carolina when this action was commenced, South Carolina lacks continuing interstate jurisdiction to modify its Amended Final Order under the PKPA.

II. The decision of the Supreme Court of South Carolina failing to hold that South Carolina lacks subject matter jurisdiction to modify its child support order conflicts with the federal Full Faith and Credit for Child Support Orders Act, 28 U.S.C. §1738B ("FFCCSOA"), where neither of the parties nor the child were residents of South Carolina when the underlying action was commenced.

The controlling authorities that determine the question of whether a South Carolina family court which issued the initial child support order maintains continuing exclusive jurisdiction in an action to modify that order are contained in the provisions of the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. §1738B ("FFCCSOA") and the South Carolina version of the Uniform Interstate Family Support Act, S.C. Code Ann. §20-7-960 *et seq.* ("UIFSA").

The FFCCSOA and UIFSA govern the *subject matter* jurisdiction – not personal jurisdiction – of state courts to rule in child support disputes. *See, e.g., Badeaux v. Davis,*

337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). The provisions of the FFCCSOA and UIFSA concerning the continuing exclusive jurisdiction of a state to modify its own pre-existing child support order are consistent. *Id.* at 213, 522 S.E.2d 835.

The provisions of the FFCCSOA which address continuing jurisdiction are contained in subsection (d) of 28 U.S.C. §1738B and provide as follows:

> Continuing Jurisdiction. – A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

A child support order made by a court of a state is made consistently with the FFCCSOA if, pursuant to the laws of that state and subsections (e), (f) and (g), the court has subject matter jurisdiction to enter the order and personal jurisdiction over the contestants. 28 U.S.C. §1738B(c). Subsections (e), (f) and (g) of the FFCCSOA address the authority of a court of one state to modify a child support order of another state, the priority given to multiple child support orders and the enforcement of modified orders, respectively. 28 U.S.C. §1738B(e), (f) and (g).

Similarly, the provisions of the UIFSA addressing continuing jurisdiction are contained in S.C. Code Ann. §20-7-1000(A) (Supp. 2006) and read as follows:

> A tribunal of this State issuing a support order consistent with the law of this State has continuing, exclusive jurisdiction as long as this State remains the residence of the obligor, the

> individual obligee, or the child for whose benefit the support order is issued.

Although the parties may file written consent for another state to assume continuing exclusive jurisdiction and modify a child support order of the issuing state, the UIFSA does not permit the parties to extend the continuing jurisdiction of the issuing state to modify its own order by written consent after the parties and child have left the jurisdiction. Recent amendments in 2001 to the uniform version of the Uniform Interstate Family Support Act addressed the issue of allowing nonresidents to consent to the continuing exclusive jurisdiction of the state that issued the original order, but South Carolina has not adopted those amendments.

No South Carolina cases directly address the question of whether a South Carolina family court which issued the initial child support order maintains continuing exclusive jurisdiction to modify its order under facts similar to the present case. *Cf. Badeaux v. Davis*, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999) (holding that South Carolina lacked subject matter jurisdiction under the UIFSA to modify a valid child support order from Mississippi since the mother and child remained residents of Mississippi when the South Carolina action was filed). Cases from other jurisdictions interpreting comparable UIFSA provisions make it clear that the court issuing a child support order loses continuing exclusive jurisdiction once both parties leave the state to reside in other jurisdictions, even where no other jurisdiction has modified the order. For example, in *In re Marriage of Metz*, 69 P.3d 1128 (Kan. Ct. App. 2003), the court applied UIFSA to hold that a Kansas trial court had no subject matter jurisdiction to modify its original child support order after the father moved to Oklahoma and the mother and the children moved to

Virginia. The court determined that, although the Kansas trial court retained jurisdiction to enforce its original order, that court no longer had jurisdiction to consider the father's motion to modify his support obligation.

The interpretation in *In re Marriage of Metz* regarding the UIFSA provision for continuing exclusive jurisdiction is the majority viewpoint. For other cases concluding that a state loses jurisdiction to modify its child support order after all parties establish residence in another jurisdiction, see *McHale v. McHale*, 109 P.3d 89 (Ariz. Ct. App. 2005) (trial court did not retain jurisdiction to modify preexisting child support order after mother, father, and child had all moved and were residing in other states; although statute was ambiguous on its face, legislative history of statute indicated that trial court lost its authority to modify its original order once the parties left the state, which established a "bright-line" rule that would prevent multiple, inconsistent support orders among different states); *Jurado v. Brashear*, 782 So. 2d 575, 580 (La. 2001) (Louisiana, as the issuing state, did not retain jurisdiction to modify child support order after parents and children had all moved from Louisiana); *Mamberg v. Epstein*, 707 N.Y.S.2d 439 (App. Div. 2000) (state court lacked continuing exclusive jurisdiction to modify child support provisions contained in New York divorce judgment where neither party to judgment nor affected child resided in state); *Knowlton v. Knowlton*, 110 P.3d 578 (Okla. Civ. App. 2005) (district court lacked jurisdiction to modify child support order issued in connection with divorce granted by it where, at time of filing of former wife's motion for modification, neither she, children, nor former husband were residents of state); *Kersey v. Jefferson*, 791 A.2d 419 (Pa. Super. Ct. 2002) (child support matter was properly transferred to New Jersey court, where none of the parties

currently resided within Commonwealth of Pennsylvania and mother and child resided in New Jersey); and *In re B.O.G.*, 48 S.W.3d 312 (Tex. App. 2001) (trial court did not have jurisdiction over father's motion to modify child support, as father, mother, and child had all moved out of state).

As in any other case, subject matter jurisdiction under the FFCCSOA and UIFSA based on the residence of the parties is determined at the time the action is commenced, and subsequent changes of residence do not affect the jurisdiction of the court. Uniform Interstate Family Support Act (2001), § 205 cmt.; *see, e.g.*, *Minneapolis & St. L. R.R. v. Peoria & P. U. Ry.*, 270 U.S. 580 (1926) (jurisdiction is determined as of time suit is begun).

Therefore, assuming that no other court has properly assumed jurisdiction, the FFCCSOA and the UIFSA set forth essentially two requirements, both of which must be met, for a South Carolina family court to retain continuing jurisdiction and modify its original child support order, to wit:

1) that this State had subject matter and personal jurisdiction under its own laws to issue the original child support order; and
2) that this State remains the residence of the child or of the child support payor or payee at the time when the child support modification action is filed.

In the present case, it is undisputed that the family court had subject matter jurisdiction and jurisdiction over the parties in their divorce action in which the family court issued the original child support order in the form of the Amended Final Order. Accordingly, the first requirement under the FFCCSOA and the UIFSA was met. However, when the instant action was commenced, neither the Child

nor either party was a resident of South Carolina. The Mother and the Child were residents of North Carolina, and the Father was a resident of Georgia. (App. 65-66). Therefore, the second requirement under the FFCCSOA and the UIFSA was not met. Since both requirements were not met in this action, South Carolina lacks continuing exclusive jurisdiction to modify the child support provisions of the Amended Final Order.

CONCLUSION

Ultimate review of the decision of the Supreme Court of South Carolina will help ensure compliance of state courts with the provisions of the PKPA and FFCCSOA in an effort to avoid the types of intractable jurisdictional deadlocks involved in this case which the Acts were intended to prevent and which were contemplated by this Court in *Thompson v. Thompson*, 484 U.S. 174, 187 (1988). The Father respectfully requests that this Court grant this Petition, issue a writ to review the decision of the Supreme Court of South Carolina, find that the decision conflicts with the federal PKPA and FFCCSOA and cases construing those provisions, vacate that court's decision, and remand the matter with instructions to dismiss the underlying action for lack of subject matter jurisdiction under those federal Acts.

Respectfully submitted,

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641 S.E.2d 419

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Arnal, Appellant,

v.

Laura Lawton Fraser, Respondent.

Appeal from Beaufort County
Judy C. Bridges, Family Court Judge
Wayne M. Creech, Family Court Judge

Opinion No. 26253
Submitted December 7, 2006 – Filed January 22, 2007

AFFIRMED IN PART; REVERSED IN PART

David Emil Arnal, of Marietta, Georgia, pro se.

Donald B. Clark, Susan C. Rosen, and Robert N. Rosen, all of Rosen Law Firm, LLC, of Charleston, for Respondent.

Ralph E. Tupper, of Tupper Grimsley, Dean, PA, of Beaufort, for Guardian Ad Litem.

PER CURIAM: We certified David Arnal's (Father's) four appeals pursuant to Rule 204(b), SCACR, and consolidated them for briefing purposes. Father raises six issues arising out of four family court orders. We affirm in part and reverse in part.

FACTS

Father and Laura Lawton Fraser (Mother) were divorced by order of the family court on October 17, 2001. The amended final order awarded custody of the parties' minor child, Samuel, to Mother, granted visitation to Father, required Father to pay child support, divided marital property, and addressed all other issues between the parties.

Father and Mother cross-appealed a total of sixteen issues arising out of the amended final order, and the Court of Appeals resolved these issues in *Arnal v. Arnal,* 363 S.C. 268, 609 S.E.2d 821 (Ct.App. 2005). Mother petitioned this Court, and we granted certiorari to address five issues from the Court of Appeals' decision. This Court affirmed the Court of Appeals with modification in *Arnal v. Arnal,* Op. No. 26215, (S.C. Sup. Ct. filed October 23, 2006) (Shearouse Adv. Sh. No. 40 at 27) ("first appeal").

While the first appeal was pending, Father filed the current action (Case No. 2003-DR-07-183) in the Beaufort County family court on February 10, 2003. In his complaint, Father requested modification of his child support obligation and asked for more control over health-care decisions for Samuel, who has Down's syndrome.

After this action was filed in February 2003, numerous hearings have been held to address emergency motions and rule to show cause actions filed by both parties. The four appealed orders stem from these hearings.

The first order suspended Father's overnight visitation upon Mother's motion. Mother alleged Father violated

previous court orders[1] by failing to videotape the administration of medications to Samuel.

The second order addressed Mother's claim that Father failed to reimburse Samuel's uncovered medical expenses as required by the final divorce order. The family court found Father owed Mother for uncovered medical expenses previously incurred, and the court ordered both parents to pay in advance for language tutoring and other educational expenses.

In the third order, the family court found Father to be in contempt for (a) failing to provide proof of valid life insurance as required by the amended final order; (b) failing to comply with a prior order compelling discovery; and (c) failing to comply with prior orders requiring Father to videotape medicine administration. The court then sentenced Father to a period of incarceration not to exceed six months for each finding of contempt but allowed Father to purge these sentences by complying with the prior orders.

One of the conditions attached to Father's purging of his contempt sentence was, "If Father fails to provide the required video to Mother on any occasion within the following twelve (12) months after the issuance of this order, a warrant shall be issued for his arrest for failure to meet the conditions to purge the contempt." Father initially complied with the conditions for purging his contempt sentence and avoided incarceration.

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[1] The previous family court orders requiring videotaping were both issued while the first appeal was pending.

The fourth order appealed by Father was the issuance of a bench warrant for contempt. Based upon affidavits by Mother and the guardian *ad litem* (GAL), the family court found that Father failed to comply with the provisions of the third order by not properly videotaping the medication administration within the twelve month period as required under the third order. The warrant has been stayed while this appeal was pending.

ISSUES

I. Should the current action (2003-DR-07-183) filed by Father, requesting child support modification and more control in Samuel's health-care decisions, be dismissed for lack of subject matter jurisdiction? If so, should the Court void and vacate all orders issued in this action?

II. Did the family court abuse its discretion by ordering Father to pay uncovered medical expenses as a result of Mother's rule to show cause actions to enforce the final divorce order, when Father claims such expenses were not proper, reasonable, or necessary?

III. Did the family court err by ordering Father to pay educational and other non-medical expenses?

IV. Did the family court abuse its discretion by terminating Father's overnight visitation?

V. Did the family court err in refusing to appoint a medical GAL for Samuel?

VI. Were the contempt sentence and requirements for purging in the third order, along with the subsequent order issuing a bench warrant for Father's arrest, an unconstitutional violation of Father's due process rights?

ANALYSIS

Issue I: Subject Matter Jurisdiction[2]

Both parties briefed the issue of subject matter jurisdiction by analyzing the Uniform Child Custody Jurisdiction Act, S.C. Code Ann. §§ 20-7-782 to -830 (1985) ("UCCJA") and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2000) ("PKPA"). As discussed below, the jurisdictional issues in this case are governed by Rule 205, SCACR, and by Rule 225, SCACR.

Father contends that the UCCJA and the PKPA prohibit the Beaufort County family court from exercising subject matter jurisdiction over the current modification action. He argues that all orders should be voided and vacated because, by the time this action was filed in February 2003, Father had moved to Georgia while Mother and Samuel lived in North Carolina. We disagree.

Both the PKPA and the UCCJA govern jurisdictional disputes between courts of different states when multiple states claim jurisdiction over a custody or child visitation dispute.[3] In this case, however, no other state is competing

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[2] Father raises the issue of subject matter jurisdiction for the first time on appeal. Subject matter jurisdiction may be raised at any time, including on appeal. *State v. Downs,* 361 S.C. 141, 604 S.E.2d 377 (2004).

[3] *See* 28 U.S.C. 1738A(a); S.C. Code Ann. § 20-7-788(a) ("A court of this State which is competent to decide *child custody matters* has jurisdiction to make a child custody determination by initial or modification decree if . . . ") (emphasis added); *Clay v. Burckle,* 369 S.C. 651, 633 S.E.2d 173 (Ct.App. 2006) ("The PKPA and UCCJA govern the subject matter jurisdiction of state courts to rule in *interstate* custody disputes.") (emphasis added); *Kirylik v. Kirylik,* 292 S.C. 475, 477, 357 S.E.2d 449, 450 (1987) (stating that UCCJA was enacted to prevent conflicting custody decrees between different states).

with South Carolina for jurisdiction, and the current action does not include a child custody dispute. Instead, both parties rely on a Court of Appeals decision which addressed subject matter jurisdiction under the PKPA and UCCJA in a situation similar to the present case, i.e. neither parents nor child resided in South Carolina and no other state was competing for jurisdiction. *Widdicombe v. Tucker-Cales,* 366 S.C. 75, 620 S.E.2d 333 (Ct.App. 2005). However, *Widdicombe* only addressed custody, whereas custody has never been an issue in this case or in the first appeal.

Neither the PKPA nor the UCCJA apply to the specific issues raised here. The jurisdictional issues in this case are governed by Rule 205 and by Rule 225, SCACR.

Rule 205, SCACR, provides the appellate court with exclusive jurisdiction over matters on appeal. The lower court may only proceed with matters not affected by the appeal. Rule 225(a), SCACR, in governing matters which are stayed while on appeal, provides:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the trial judge, appellate court, or judge or justice thereof. **The lower court retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.**

(emphasis added). Under Rule 205 and the last sentence of the above-quoted portion of Rule 225, the lower court may

not act or issue orders that affect an issue on appeal.[4] Under Rule 225, the lower court may act only to enforce matters not stayed by the appeal.

Because Father's payment of child support and medical expenses as required by the final divorce order were not stayed by the appeal,[5] the family court retained jurisdiction to enforce those payments. However, the family court did not have jurisdiction to *modify* matters in the final divorce order that were on appeal. Rule 205, SCACR; *See also Wingate v. Wingate,* 289 S.C. 574, 347 S.E.2d 878 (1986) (because alimony was an issue on appeal from the divorce decree, the Court had exclusive jurisdiction over the alimony issue, and the family court was without jurisdiction to change the amount of alimony during the pending appeal).

Accordingly, we cannot say that all orders in the present action are void for a lack of subject matter jurisdiction. Each contention made by Father must be analyzed to determine whether the family court's decision was affected by a matter on appeal or whether Mother simply sought to enforce the amended final order.

Issue II: Uncovered Medical Expenses

In the final divorce order, Mother was given complete authority to make all decisions regarding Samuel's medical and educational needs. Father was required to pay his

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[4] A party can always seek a remand from an appellate court if the circumstances of the particular case require it.

[5] "Family court orders regarding a child or requiring payment of support for a spouse or child" are exceptions to the automatic stay. Rule 225(b)(6), SCACR.

pro-rata share of 64.4% of the uncovered medical expenses. Because this payment was not stayed pursuant to Rule 225(b)(6), SCACR, Father was required to pay these medical expenses, and the family court retained jurisdiction to enforce this provision during the appeal.

Although the issue of apportioning medical expenses from the final divorce order was on appeal, Father did not seek to modify his obligation in the present case, and this dispute did not affect a matter on appeal. Instead, Father asked the family court to determine whether the medical expenses previously submitted by Mother were subject to the provisions of the final order. This issue could be addressed by the family court under Rule 205 and under Rule 225, SCACR.

Father contends that the order directing him to pay or reimburse Mother for uncovered medical expenses constituted an abuse of discretion. He argues that these medical expenses were not reasonable for several reasons and claims he should not have to pay for unconventional and unnecessary treatment. Father also argues that he should not have to pay medical expenses that are not submitted to insurance providers. We disagree.

After a hearing on the issue of medical expenses, the family court determined that the medical expenses were reasonable and proper under the final divorce order. Father offered numerous reasons why the expenses did not fall under the scope of the final order, and the family court disagreed and ordered Father to pay his required share. Although this Court has the authority to find facts in accordance with its own view of the preponderance of the evidence, we should not disregard the findings of the family court judge, who saw and heard the witnesses.

Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999). The family court did not abuse its discretion by finding Father's payment of the requested medical expenses to be enforceable under the final divorce order.

Issue III: Educational and Non-medical Expenses

The amended final order specifically declined to address educational expenses. Because these types of expenses were not dealt with in the final order, this matter was not affected by the appeal, and Rules 205 and 225, SCACR, would not prohibit the family court from exercising jurisdiction over this issue.

Father argues that the family court erred by requiring Father to pay his share of Samuel's educational expenses such as language and speech tutoring and early education training. We disagree.

The family court did not abuse its discretion by requiring both parents to split the costs for these expenses. The order required both parents to pay for language tutoring and therapist bills in advance, and the family court did not abuse its discretion in finding these expenses appropriate to Samuel's care.

Issue IV: Termination of Overnight Visitation

Father contends that the family court erred in terminating his overnight visitation for failing to meet the videotaping requirements mandated by the family court. We agree, due to the jurisdictional bar of Rule 205 and Rule 225, SCACR.

The final divorce order set very specific parameters for Father's visitation. Father appealed the portion of the final order to the Court of Appeals concerning summer and holiday visitation. Thus, the family court would not have jurisdiction to modify terms of visitation because the appellate court would have exclusive jurisdiction over the matter on appeal.[6]

The family court modified Father's visitation while the first appeal was pending. By first requiring Father to videotape the administration of medicine as a condition of his visitation, and then by suspending Father's overnight visitation for failure to comply with the videotaping conditions, the family court violated our appellate court rules by issuing orders that were affected by a matter on appeal. Therefore, the order that suspended overnight visitation was void for lack of jurisdiction.

Issue V: Medical GAL

Father argues the family court erred in refusing to appoint a medical GAL. We disagree.

The authority to appoint a GAL solely for medical determinations comes from S.C. Code Ann. § 20-7-1545 (Supp. 2005). That statute gives the family court absolute

[6] Although conditions of visitation and the grant of additional summer and holiday visitation may not appear to be the same matter being addressed on appeal, the decisions both of the Court of Appeals and of this Court in the first appeal were impacted by the suspension of overnight visitation in deciding whether to award Father additional summer and Easter visitation. The Court of Appeals noted that Father had not been exercising overnight visitation in its opinion, while the suspension of overnight visitation came before this Court at oral argument during the first appeal.

discretion in determining who will serve as a GAL. Furthermore, the family court may appoint a GAL without consent of both parties when "the court will likely not be fully informed about the facts of the case and there is a substantial dispute which necessitates a guardian ad litem." S.C. Code Ann. § 20-7-1545(A)(1).

Under S.C. Code Ann. § 20-7-1549 (Supp. 2005), the duties and responsibilities of a GAL already include authority to review medical records and the duty to conduct an independent, balanced, and impartial investigation of facts relevant to the situation of the child and the family. Accordingly, the failure of the family court to appoint a GAL strictly for medical advisement did not constitute an abuse of discretion.

Issue VI: Civil Contempt and Conditions of Purging

Father contends that the contempt sentence and purging provisions of the two orders by Judge Creech are unconstitutional violations of Father's rights. We believe the contempt sentence was improperly based on an order for which no jurisdiction existed under Rule 225, SCACR. Therefore, we reverse the finding of contempt, but we decline to address Father's constitutional arguments.

The finding of contempt against Father stems from his repeated failure to properly videotape the administration of Samuel's medicine. As previously discussed, the initial order requiring Father to videotape the giving of medicine is void for lack of jurisdiction because that order modified the terms of Father's visitation, an issue which was being appealed. Father cannot be held in contempt for violating an order which was void *ab initio* for a lack of jurisdiction. *See Luthi v. Luthi,* 297 S.C. 306, 376 S.E.2d

782 (Ct.App. 1989) (during husband's appeal of an equitable division award to former wife, the lower court's order that the monetary equitable division award to former wife was a properly enrolled money judgment was void for lack of jurisdiction; as a result, the subsequent order awarding interest on the judgment was also invalid).

Because the contempt issue can be resolved without reaching Father's due process claims, we decline to address the constitutional issues raised by Father. It is our firm policy to decline to rule on constitutional issues unless such a ruling is required. *In re McCracken,* 346 S.C. 87, 551 S.E.2d 235 (2001).

CONCLUSION

The four appealed orders in this case are not automatically void pursuant to the UCCJA and the PKPA. Our appellate court rules control whether the issues were properly before the family court while the first appeal was pending. We affirm the family court's order requiring Father to pay his share of medical expenses, and we affirm the order requiring both parents to share non-medical and educational expenses. We also affirm the denial of Father's request for a medical GAL. Finally, we reverse the suspension of Father's overnight visitation, and we also reverse the finding of contempt for violating an order that was void for lack of jurisdiction.

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE FAMILY COURT FOR THE FOURTEENTH JUDICIAL CIRCUIT
DAVID EMIL ARNAL, Plaintiff, vs. LAURA LAWTON FRASER Defendant.	CASE NUMBER: 2003-DR-07-183 **ORDER** (Filed Sep. 8, 2004)

Presiding Judge:	The Honorable Judy C. Bridges
Date of Hearing:	August 2, 2004
Plaintiff's Counsel:	Plaintiff appeared *pro se*
Defendant's Counsel:	Susan C. Rosen, Esquire
Guardian *ad Litem*:	Ralph E. Tupper, Esquire
Court Reporter:	Timothy Nicholas

This matter came before the Court on August 2, 2004, for a hearing on Defendant's Motion for Temporary Relief filed on July 16, 2004, and Plaintiff's Motion for Temporary Relief filed on July 19, 2004. Because there was insufficient time to hear Defendant's Rule to Show Cause, filed on July 16, 2004 and which was also scheduled to be heard, it was continued. Notice shall be served by mail of the date and time of the hearing on Defendant's Rule to Show Cause, which Rule has already been duly served on Plaintiff. Defendant appeared at the hearing with her attorney, Susan C. Rosen, and Plaintiff appeared *pro se*.

Based upon the pleadings, affidavits, other documents on file, and on argument of counsel and Plaintiff, the Court makes the following findings of fact and conclusions of law:

Plaintiff's Motion for Temporary Relief

1. Plaintiff moves for a temporary reduction of child support and at the hearing verbally requested other relief not included in his written Motion for Temporary Relief. In accordance with Rule 21, SCRFC, relief not requested by Plaintiff in his Motion for Temporary Relief, filed on July 19, 2004, is denied. *See, e.g., Michel v. Michel,* 289 S.C, 187, 345 S.E.2d 730, (S.C. Ct. App. 1986).

2. While Defendant has previously submitted an application for Medicaid benefits for the minor child of the parties, which application was denied, Defendant agreed to complete another application for Medicaid benefits for the minor child of the parties.

3. I take judicial notice of the prior orders of this Court which set forth Plaintiff's long history of violating of court orders, his ability to earn a living, occupational qualifications, and earning potential. "In order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earning level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community." *Engle v. Engle,* 343 S.C. 444, 449, 539 S.E.2d 712, 714 (Ct. App. 2000). Plaintiff earned $66,140.22 of income in the first six months of this year and has significant earning potential. However, based on the evidence offered at the hearing, including the June 2004 documents from the Georgia Department of Labor's unemployment insurance office, I find that Plaintiff is entitled to a ninety (90) day reduction in child support, to be based upon the child support guidelines, reserving to Defendant the right to request and receive reimbursement for the difference in

what Plaintiff is currently paying and the reduced amount should Plaintiff not prevail on the merits of this issue at the final hearing.

4. I find that based on the child support guidelines, for a three (3) month period commencing August 1, 2004 and ending on October 31, 2004, Plaintiff shall pay to Defendant $352 per month as and for child support and shall pay 16.89% of the unreimbursed medical expenses incurred during that period for the minor child. Commencing on November 1, 2004, the child support payments shall return to the previous amount of amount One Thousand Four Hundred and Ninety-Seven Dollars ($1,497.00) and Plaintiff shall pay 64% of all unreimbursed medical expenses incurred on that date and thereafter. Child support payments shall continue to be made through the Clerk of the Family Court, together with the additional five percent (5%) court costs added to the payment.

Appointment of a Guardian *ad Litem*

5. The Court finds that it is in the best interest of the minor child of the parties to have a guardian *ad litem* appointed in this case. Since Ralph E. Tupper was appointed as the Guardian prior to the final hearing on the merits of the divorce action between the parties and is familiar with the parties, the minor child, and the issues in this case, I find that it is in the best interest of the minor child and will promote economy for the court and the parties for Ralph E. Tupper to be appointed to continue as the Guardian *ad Litem* in this case. Mr. Tupper shall be compensated by the parties at the rate of One Hundred Twenty-Five Dollars ($125.00) per hour. An initial retainer of Two Thousand Dollars ($2,000.00) shall

be paid to Ralph E. Tupper by the parties. Commensurate with the pro rata shares of the parties during the three month period commencing August 1, 2004, Plaintiff shall pay Five Hundred Dollars ($500.00) of the retainer and Defendant shall pay One Thousand Five Hundred Dollars ($1,500.00) of the initial retainer. The Guardian *ad Litem* shall bill at the rate of One-Hundred Twenty-Five Dollars ($125.00) per hour against this retainer, and ~~after the ninety (90) day period, Plaintiff and Defendant shall pay their respective pro rata share of any additional fees incurred by the Guardian *ad Litem* based upon the percentages set forth in the previous Order of this Court.~~ [should GAL fees exhaust the retainer, the GAL shall file a Motion for additional fees and costs which shall be determined by the Court. /s/ JB] Therefore, commencing as of November 1, 2004, Father shall pay sixty-four percent (64%) of all fees charged by the Guardian *ad Litem* and Mother shall pay thirty-six percent (36%) of the fees charged by the Guardian *ad Litem*, said fees to be paid within 30 days after the date of the invoice sent by the Guardian *ad Litem*.

6. Upon receipt of the retainer, the Guardian *ad Litem* shall conduct an investigation into the allegations regarding whether or not Plaintiff is administering medications and nutritional supplements to the minor child in accordance with the previous orders of this Court. The Guardian shall file a motion to modify the Plaintiff's visitation schedule if the change in visitation on a temporary basis outlined below is not warranted.

Defendant's Motion for Temporary Relief

7. In her Motion for Temporary Relief, Defendant requests a change in visitation. At the hearing on this

motion, Plaintiff moved to dismiss the motion based upon insufficient service and notice and Defendant moved to shorten the time to hear this motion. Based upon the Affidavits of Due Diligence, the Certificate of Service, and the other pleadings and documents on file, I find that Plaintiff's motion shall be denied, Defendant's motion shall be granted, and Defendant's Motion for Temporary Relief shall be heard.

8. I take judicial notice of the prior findings and rulings of the Court in this case. One thing is very clear; the Court has made very detailed findings and rulings relating to the care of the minor child and the administration of medications and nutritional supplements to the minor child. Plaintiff has repeatedly failed and refused to follow the medical advice of the minor child's physicians, failed to administer medications and nutritional supplements, and failed to comply with the instructions provided by Defendant.

9. Considering all of the evidence submitted and based on the arguments, I find that the visitation of Plaintiff with the minor child should be modified on a temporary basis. Plaintiff has not explicitly followed the instructions as provided to him by Defendant and as set forth in the prior Orders of this Court, including without limitation, the administration of medications and nutritional supplements to the minor child and the requirements imposed relating to the video taping of the administration of the medications and nutritional supplements to the minor child.

10. I find that it is in the best interest of the minor child for Plaintiff's visitation to be immediately changed to require that during visitation times, Plaintiff shall

return the minor child to the Defendant at night so that she can make certain that the child receives his proper medications and supplements in the morning and in the evening and can properly monitor the health of the minor child during visitation periods. I find that during Plaintiff's visitation periods, Plaintiff shall pick up the minor child at 9:00 a.m. each morning and shall return the minor child to Defendant at 6:00 p.m. each evening. Plaintiff shall continue to videotape the administration of medicines and nutritional supplements as set forth in the Order of this court dated July 8, 2003.

11. During the time that the minor child is on Hilton Head Island, Plaintiff shall meet Defendant for the hand-off of the minor child at the Sea Pines Reception Center located on Hilton Head Island. Defendant has agreed to share some of the burden of this change in visitation and has agreed to take the minor child to his father in Atlanta on alternating visitation periods. The exchange in Atlanta, Georgia, shall take place at 714 Peachtree Battle Avenue, Atlanta. The first visitation of each month shall take place on Hilton Head Island and the second visitation of each month shall be in Atlanta, Georgia. If there is a third visitation period in any month, it shall take place on an alternating schedule with the initial third visitation on Hilton Head Island, South Carolina [with exchange at Sea Pines Reception Center, /s/ JB] Defendant shall notify Plaintiff when the minor child returns to Brevard[.] ~~after which the hand-off will be at the usual Brevard meeting place on alternating visitation periods instead of on Hilton Head Island~~ [/s/ JB]

Based upon the findings of fact and conclusions of law set forth above, it is hereby

ORDERED ADJUDGED AND DECREED that:

1. For a three (3) month period commencing August 1, 2004 and ending on October 31, 2004, Plaintiff shall pay to Defendant $352 per month as and for child support and shall pay 16.89% of the child's unreimbursed medical expenses incurred during this three month period. Commencing on November 1, 2004, the child support payments will return to the previous amount of amount One Thousand Four Hundred and Ninety-Seven Dollars ($1,497.00) and Plaintiff shall pay sixty-four (64) percent of all unreimbursed medical expenses incurred on that date and thereafter. Child support payments shall continue to be made through the Clerk of the Family Court, together with the additional five percent (5%) court costs added to the payment.

2. Ralph E. Tupper shall be appointed to continue as the Guardian *ad Litem* in this case. Mr. Tupper shall be compensated by the parties at the rate of One Hundred Twenty-Five Dollars ($125.00) per hour. An initial retainer of Two Thousand Dollars ($2,000.00) shall be paid to Ralph E. Tupper by the parties. Plaintiff shall pay Five Hundred Dollars ($500.00) of the retainer and Defendant shall pay One Thousand Five Hundred Dollars ($1,500.00) of the initial retainer. The Guardian *ad Litem* shall bill at the rate of One-Hundred Twenty-Five Dollars ($125.00) per hour against this retainer ~~and after the ninety (90) day period, Plaintiff and Defendant shall pay their pro rata share of any additional fees incurred by the Guardian *ad Litem*, based upon the percentages as set forth in the previous Order of this Court.~~ [. Should GAL fees exhaust the retainer the GAL shall file a Motion for additional fees and costs which shall be determined by the Court. /s/ JB] Therefore, commencing as of November 1, 2004, Father

shall pay sixty-four percent (64%) of all fees charged by the Guardian *ad Litem* and Mother shall pay thirty-six percent (36%) of the fees charged by the Guardian *ad Litem,* said fees to be paid within 30 days after the date of each invoice sent by the Guardian *ad Litem.* Upon receipt of the retainer, the Guardian *ad Litem* shall conduct an investigation into the allegations regarding whether or not Plaintiff is administering medications and nutritional supplements to the minor child in accordance with the previous orders of this Court and the instructions provided him by Defendant. The Guardian shall file a motion to modify the Plaintiff's visitation schedule if the change in visitation on a temporary basis outlined below is not warranted.

12. Visitation by Plaintiff with the minor child shall be immediately changed to require that during visitation times, Plaintiff shall return the minor child to the Defendant at 6:00 p.m. each evening and he shall pick the minor child up from the Defendant each morning at 9:00 a.m. During the time that the minor child is on Hilton Head Island, Plaintiff shall meet Defendant for the hand-off of the minor child at the Sea Pines Reception Center located on Hilton Head Island. On alternating visitation periods, the exchange in Atlanta, Georgia, shall take place at 714 Peachtree Battle Avenue, Atlanta. The first visitation of each month shall take place on Hilton Head Island and the second visitation of each month shall be in Atlanta, Georgia. If there is a third visitation period in any month, it shall take place on an alternating schedule with the initial third visitation on Hilton Head Island, South Carolina. Defendant shall notify Plaintiff when the minor child returns to Brevard, ~~after which the hand off will be at the usual Brevard meeting place on alternating visitation~~

~~periods instead of on Hilton Head Island.~~ [/s/ JB.] Plaintiff shall continue to videotape the administration of medicines and nutritional supplements as set forth in the Order of this Court dated July 8, 2003.

AND IT IS SO ORDERED.

/s/ Judy C. Bridges
JUDY C. BRIDGES
PRESIDING JUDGE

Chas, South Carolina

This 24 day of August, 2004

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE FAMILY COURT FOR THE FOURTEENTH JUDICIAL CIRCUIT
DAVID EMIL ARNAL, Plaintiff, vs. LAURA LAWTON FRASER Defendant.	CASE NUMBER: 2003-DR-07-183 **ORDER** (Filed Dec. 17, 2004)

Presiding Judge:	The Honorable Judy C. Bridges
Date of Hearing:	October 7, 2004
Plaintiff's Counsel:	Plaintiff appeared *pro se*
Defendant's Counsel:	Susan C. Rosen, Esquire
Guardian *ad Litem*:	Ralph E. Tupper, Esquire
Court Reporter:	Timothy Nicholas

This matter came before the Court on October 7, 2004, for a hearing on Defendant's Rule to Show Cause, filed on July 16, 2004. Defendant appeared at the hearing with her attorney, Susan C. Rosen, Plaintiff appeared *pro se,* and the Guardian *ad Litem,* Ralph E. Tupper, also made his appearance. There was insufficient time to hear all of the issues raised in Defendant's Rule to Show Cause. Therefore, the Court took testimony on the issue of Plaintiff's failing and refusing to reimburse Defendant for the minor child's uncovered medical expenses in violation of paragraph 36 on page 16 of the Amended Final Order; and the Court continued the remaining issues raised in the Rule to Show Cause filed on July 16,2004 pending further hearing on these matters.

Based upon the pleadings, affidavits, other documents on file, and on argument of counsel and Plaintiff, the

Court makes the following findings of fact and conclusions of law:

1. The Court takes judicial notice of the orders of Judge Fender, Judge Smoak and Judge Armstrong which have been filed in this case. These orders define the mother's and father's responsibilities and this Court cannot modify these orders.

2. I find that the issue of the father's responsibility for the payment of his share of the costs for the physical therapy treatment in California should be reserved for the final hearing. The Guardian *ad Litem* shall investigate this issue to determine if the therapist in California is one of the therapists best able to provide these services for the child and shall report and make a recommendation on this issue at the final hearing on the merits.

3. I find that the issue of attorneys' fees on this matter should be reserved and shall be heard at the final hearing on the merits.

4. I find that the father continues to disagree with the previous orders of this court, but they are the law of the case and he must follow them.

5. I find that the health insurance covering the minor child covers a maximum of $500.00 for the child's therapies. Once that amount has been met, the mother does not need to send bills to the insurance company, and I find that it is not necessary for her to do so. Father shall pay his portion of the uncovered therapy expenses as previously ordered. I do not find that the father is in contempt on this issue.

6. I find that the father owes the mother for uncovered medical expenses in the amount of Three Thousand

Three Hundred Dollars ($3,300.00), which amount was paid by the mother and has been due and owing to her since prior to the filing of this Rule to Show Cause on July 16, 2004. This amount does not include the amounts paid by the mother to the physical therapist in California

7. I find that based on the current billing method of the speech and language tutor, both parents shall pay in advance for language tutoring. The therapist bills in advance. If any refund is made for overpayment or payment for services not rendered, then the parties can be reimbursed.

Based upon the findings of fact and conclusions of law set forth above, it is hereby

ORDERED ADJUDGED AND DECREED that:

1. The father owes the mother for uncovered medical expenses in the amount of Three Thousand Three Hundred Dollars ($3,300.00), which amount was paid by the mother and has been due and owing to her since prior to the filing of this Rule to Show Cause on July 16, 2004. This amount does not include the amounts paid by the mother to the physical therapist in California; the determination of father's obligation to pay his share of these amounts shall be reserved until the final hearing on the merits after the Guardian *ad Litem* has made his investigation and recommendation on this issue;

2. Father shall pay the Three Thousand Three Hundred Dollars ($3,300.00) of past due uncovered medical expenses to the mother at the rate of $200.00 a month starting December 1, 2004, until paid in full. Father shall pay all additional uncovered medical expenses, including

his share of the uncovered therapy expenses as previously ordered;

3. Mother shall apply for TEFRA in South Carolina;

4. Both parents shall pay in advance for language tutoring. If any refund is made for overpayment or payment for services not rendered, then the parties can be reimbursed;

5. The issue of attorneys' fees on this matter should be reserved and shall be heard at the final hearing on the merits; and

6. The remaining issues set forth in the Rule to Show Cause which have not yet been addressed in this order shall be continued and shall be rescheduled by the Clerk of Court.

AND IT IS SO ORDERED.

/s/ Judy C. Bridges
JUDY C. BRIDGES
PRESIDING JUDGE

Charleston, South Carolina

This 8 day of Dec., 2004

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT DAVID EMIL ARNAL, Plaintiff, vs. LAURA LAWTON FRASER Defendant.	IN THE FAMILY COURT FOR THE FOURTEENTH JUDICIAL CIRCUIT CASE NUMBER: 2003-DR-07-183 **ORDER REGARDING RULE TO SHOW CAUSE AND MOTION FOR TEMPORARY RELIEF** (Filed Jul. 25, 2005)

Presiding Judge:	The Honorable Wayne M. Creech
Date of Hearing:	March 7 and March 11, 2005
Plaintiff's Counsel:	Sally G. Calhoun
Defendant's Counsel:	Susan C. Rosen
Court Reporter:	Timothy Nicholas, Brenda Sigwald

This matter is before me on the continuation of Laura Lawton Fraser's ("Mother") Rule to Show Cause, dated July 16, 2004, regarding David E. Arnal's ("Father") failure to provide evidence of life insurance, failure to respond to discovery as previously ordered, and failure to show the time and date on the videotapes when he administers medications and supplements to the minor child as ordered by this Court. In addition, this matter is before me on Father's Motion for Temporary Relief, dated December 30, 2004, requesting a temporary reduction in child support.

Both parties were present with their attorneys. Following the hearing, this Court took the matter under

advisement and later informed the attorneys of the Court's decision.

Based on the testimony of the parties, the pleadings, affidavits, exhibits, and other documents on file, I make the following findings of facts and conclusions of law:

1. The Amended Final Order was signed October 9, 2001 and filed in the Family Court of Beaufort County on October 17, 2001. I find that Father has willfully violated the Amended Final Order in that he has failed and refused to provide proof of valid life insurance coverage. Father is in civil contempt of court for his willful failure to provide proof of life insurance as required by paragraph 38 on page 16 of the Amended Final Order dated October 9, 2001.

2. I find that for his contemptuous behavior, Father shall be incarcerated in the Beaufort County Detention Center for a period not to exceed six months for his failure to provide proof of valid life insurance. Father may purge this sentence by providing proof of the required life insurance to Mother's attorney on or before his release and paying a civil fine in the amount of $962.50 directly to the Clerk of Court to be disbursed to Ms. Rosen to reimburse Mother for attorney's fees expended to enforce the court order.

3. An order compelling discovery was entered in this case on June 15, 2004, requiring that Father fully answer all interrogatories, respond to the requests for production of documents, and produce all requested documents within thirty (30) days of the date of the hearing, which was held on May 26, 2004.

4. I find that Father has violated the order in that he failed to fully answer and respond to all discovery requests served by Mother, in that he has not provided full responses to all discovery requests, he has failed to fully respond to all interrogatories and requests for production, and he has failed to produce all requested documents, as required by the order dated June 15, 2004. I find that Father is in contempt of Judge Smoak's order dated June 15, 2004, because he willfully failed to provide court ordered discovery.

5. I find that for his contemptuous behavior, Father shall be incarcerated in the Beaufort County Detention Center for a period not to exceed six months for his failure to fully respond to Mother's discovery requests as required by Judge Smoak's order dated June 15, 2004. Father may purge this sentence by providing all court ordered discovery to Mother's attorney prior to his release. Prior to Father's release, Mother's attorney must sign an acknowledgment of the receipt and sufficiency of all outstanding discovery previously ordered by Judge Smoak and Father must pay a civil fine in the amount of $962.50 directly to the Clerk of Court to be disbursed to Ms. Rosen to reimburse Mother for attorney's fees expended to enforce the court order.

6. Orders were signed on July 8, 2003 and February 9, 2004, and filed in the Family Court of Beaufort County on July 23, 2003 and February 17, 2004, respectively, requiring Father to video tape the administration to the minor child of medications and supplements with the date and time recorded on the videotape.

7. I find that Father has not provided video tapes of the administration of medications and supplements with

the date and time recorded on the video tapes as required by the orders. I find that Father has willfully failed and refused to videotape the administration of medicines and supplements and has refused to show the time and date on the videotape as he administers the medications and supplements, all of which is in violation of paragraph 4 on pages 2-3 of the Order dated, July 8, 2003, and paragraph 2 on page 4 of the Order dated February 9, 2004. I find Father is in contempt of Judge Smoak's orders for willfully failing to provide video tapes to Mother in accordance with the orders.

8. I find that for his contemptuous behavior, Father shall be incarcerated in the Beaufort County Detention Center for a period not to exceed six months for his failure to videotape the administration of medicines and supplements and to show the time and date on the videotapes. Father may purge this sentence by providing proof of the acquisition of a video system sufficient to meet this requirement and strict compliance with the requirements as specified in the previous orders in the future. If Father fails to provide the required video to Mother on any occasion within the following twelve (12) months after the issuance of this order, a warrant shall be issued for his arrest for failure to meet the conditions to purge the contempt. Father shall then be incarcerated for up to six months and may purge only upon production of the video required and not produced. Prior to his release, Father must also pay a civil fine in the amount of $962.50 directly to the Clerk of Court to be disbursed to Ms. Rosen to reimburse Mother for attorney's fees expended to enforce the court order.

9. In addressing the Father's Motion for Temporary Relief with regard to a reduction in child support, the

Amended Final Order, dated October 9, 2001, required that Father pay child support in the amount of $1,564.00, to be paid semi-monthly, commencing on the date of filing of the Amended Final Order. Father has requested a reduction in child support to allow consideration of his child born since the issuance of Judge Armstrong's Final Amended Order.

10. I find that the child support guidelines, adjusted to allow consideration of the child born since the issuance of the Amended Final Order, require Father to pay $1,376 per month in child support. I find that Father shall be allowed a reduction in child support in consideration of the child born since Judge Armstrong's Amended Final Order, and that the new child support amount is $1,376; however, the support will otherwise remain as ordered by Judge Armstrong.

11. I find that Father's request to recognize the findings of the Court of Appeals is premature. The opinion has not yet been remitted by the Court of Appeals.

12. I find that Father has failed to make a prima facie showing of facts sufficient to grant any other relief requested in his motion. All relief, except as to child support modification is denied.

13. Mother requested attorney's fees for the defense of Father's motion and for the prosecution of Mother's Rule to Show Cause. Ms. Rosen submitted an affidavit of attorney's fees showing fees and costs for the motion for temporary relief in the amount of $2,994.00 and for the prosecution of Mother's Rule to Show Cause in the amount of $962.50 and also submitted a supplemental affidavit requesting an additional $2,525.00 in attorney's fees and costs. I find that Father shall pay a civil fine to reimburse

Mother for a portion of her attorney's fees expended to enforce the court order in the amount of $962.50, which amount must be paid to purge the jail sentences and allow the release of Father from custody at the Beaufort County Detention Center.

14. Mother's request for attorney fees for defending the Motion for Temporary Relief is held in abeyance until the final hearing.

15. Ms. Calhoun's request for fees for representing the Father is denied.

It is, therefore,

ORDERED, ADJUDGED AND DECREED that Father is in civil contempt and is sentenced to a period not to exceed six months and shall be incarcerated in the Beaufort County Detention Center for his failure to provide proof of valid life insurance as required by paragraph 38 on page 16 of the Amended Final Order dated October 9, 2001. Father may purge this sentence by providing proof of the required life insurance to Mother's attorney on or before his release and paying a civil fine in the amount of $962.50 directly to the Clerk of Court to be disbursed to Ms. Rosen to reimburse Mother for attorney's fees expended to enforce the court order;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Father is in civil contempt and is sentenced to a period not to exceed six months and shall be incarcerated in the Beaufort County Detention Center for his failure to provide court ordered discovery pursuant to Judge Smoak's order dated June 15, 2004. Father may purge this sentence by providing all court ordered discovery to Mother's attorney prior to his release and obtaining

a signed acknowledgement from Mother's attorney as to the receipt and sufficiency of all outstanding discovery and paying a civil fine in the amount of $962.50 directly to the Clerk of Court to be disbursed to Ms. Rosen to reimburse Mother for attorney's fees expended to enforce the court order;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Father is in civil contempt and is sentenced to a period not to exceed six months and shall be incarcerated in the Beaufort County Detention Center for his failure to video tape administration of medications and supplements with the date and time recorded on the video as required by the orders dated July 8, 2003 and February 9, 2004. Father may purge this sentence by providing proof of his acquisition of a video system sufficient to meet this requirement and strict compliance with the requirements as specified in the previous orders in the future and paying a civil fine in the amount of $962.50 directly to the Clerk of Court to be disbursed to Ms. Rosen to reimburse Mother for attorney's fees expended to enforce the court order;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if Father fails to provide the required video to Mother on any occasion within the following twelve (12) months after issuance of this order, a warrant shall be issued for his arrest for failure to meet the conditions to purge of contempt. Father shall then be incarcerated for up to six months and may purge the sentence only upon production of the video required and not produced;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Father's request to reduce child support on a temporary basis is granted to the extent that it allows

consideration of his child born since the issuance of Judge Armstrong's Final Amended Order; that Father's child support obligation shall be $1,376 per month, payable as $688 on the 1st and 15th of each month, and that all other support provisions of the Amended Final Order shall remain as ordered by Judge Armstrong;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mother's request for attorney's fees for defending the Motion for Temporary Relief is held in abeyance until the final hearing;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Ms. Calhoun's request for attorney's fees for representing the Father is denied.

AND IT IS SO ORDERED.

/s/ Wayne M. Creech
WAYNE M. CREECH,
PRESIDING JUDGE
FOURTEENTH
JUDICIAL CIRCUIT

Orangeburg, South Carolina

This 18 day of July, 2005.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT DAVID EMIL ARNAL Plaintiff vs. LAURA LAWTON FRASER Defendant.	IN THE FAMILY COURT FOURTEENTH JUDICIAL CIRCUIT CASE # 03-DR-07-183 **ORDER** (Filed Jul. 28, 2006)

Based upon the affidavits of Laura Lawton Fraser, Defendant and Rick Corley, the Guardian ad Litem, filed with this court on July 26, 2006, I find as follows: That a bench warrant for David Emil Arnal shall be issued for failure to comply with the provisions of the order of July 25, 2005.

Based upon the above finding of fact, it is

ORDERED that The Clerk of Court shall issue a bench warrant for David Emil Arnal for failure to comply with the provisions of the order of July 25, 2005.

AND IT IS SO ORDERED.

/s/ Wayne M. Creech
Presiding Judge of the
Family Court
Fourteenth Judicial Circuit

Beaufort, S.C.

July 28, 2006

STATE OF SOUTH CAROLINA	)	**IN THE FAMILY COURT**
COUNTY OF BEAUFORT	)	**14th JUDICIAL CIRCUIT**
DAVID EMIL ARNAL **Plaintiff**	)	**BENCH WARRANT**
vs.	)	**FILE NO. 2003-DR-07-183**
LAURA LAWTON FRASER **Defendant.**	)	

TO: All the Sheriffs, Deputy Sheriffs, Constables and other Peace Officers of the State

On JULY 28, 2006, it was among other things ordered by the Honorable WAYNE CREECH, Judge of the Family Court, that a Bench Warrant be issued for the arrest of DAVID EMIL ARNAL.

Therefore,

IT IS ORDERED that you make diligent search for DAVID EMIL ARNAL, and take him/her to the county jail, where he/she will be safely held until he/she may be brought before this Court, or otherwise discharged by due course of law.

IT IS FURTHER ORDERED that the county jailer notify the clerk of court immediately, during the normal operating hours of the office of the clerk of court, that DAVID EMIL ARNAL is in custody.

IT IS FURTHER ORDERED DEFENDANT IS IN CONTEMPT FOR FAILURE TO COMPLY WITH THE PROVISIONS OF THE ORDER OF JULY 25, 2005.

JULY 28, 2006
BEAUFORT, SOUTH CAROLINA

/s/ S. Kim Daniels
FAMILY COURT ~~[Illegible]~~/CLERK OF COURT, DEPUTY

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT LAURA LAWTON ARNAL, Plaintiff, vs. DAVID EMIL ARNAL, Defendant.	IN THE FAMILY COURT FOR THE FOURTEENTH JUDICIAL CIRCUIT CASE NUMBER: 99-DR-07-1608 **AMENDED FINAL ORDER** (Filed Oct. 17, 2001)

Presiding Judge:	The Honorable Robert S. Armstrong
Date of Trial:	April 23, 24, 25, 26, and 30, 2001
Plaintiff's Counsel:	Robert Rosen, Esquire and Susan C. Rosen, Esquire
Defendant Counsel:	Sally G. Calhoun, Esquire
Guardian *ad Litem*:	Ralph Tupper, Esquire
Court Reporters:	Brenda Cooley and Tim Nicholas

This matter came before the Court on April 23-30, 2001, for a final hearing on the merits. Present at the hearing were the Plaintiff, Laura Lawton Arnal ("the Mother"), accompanied by her attorneys, Susan C. Rosen and Robert N. Rosen, and the Defendant, David Emil Arnal ("the Father"), accompanied by his attorney, Sally G. Calhoun. Prior to the commencement of the trial, Robert Stevens of Stevens & Clark moved to be relieved as the Father's counsel due to misrepresentations made by the Father to his counsel and the Father's failure to pay the agreed retainer. The Father consented for Stevens & Clark to be relieved and shortly thereafter Sally G. Calhoun, who had previously represented the Father in this proceeding, made an appearance on his behalf and represented him throughout the trial.

History of the Litigation

1. This action was commenced on December 6, 1999, by the Mother who was seeking custody of the minor child of the parties, both *pendente lite* and permanently, and structured visitation rights for the Father. The Mother also requested child support; medical, dental, and life insurance for the benefit of the minor child; that both parties be barred from any alimony; equitable division; a restraining order; and attorneys fees and costs. The Mother later amended her complaint to include claims for a divorce *a vinculo matrimonii* from the Father on the ground of one year continuous separation, retroactive child support, and an order allowing her to resume her maiden name of Laura Lawton Stone Fraser.

2. The Father answered and counterclaimed for the following relief: a divorce on the grounds of desertion; joint legal custody and with physical custody with the mother. He later amended for sole custody of the minor child and requested child support; he initially requested alimony from the Mother and later amended to request that both parties be barred from alimony; that uncovered medicals be evenly split, life insurance on the mother for the benefit of the child if the mother's prayer for life insurance on the father was granted; equitable division; a restraining order; and attorneys' fees and costs.

3. At the temporary hearing on January 5, 2000, this Court ordered that the parties would have joint legal custody of the minor child, Samuel, with the Mother having the primary physical custody of Samuel and the Mother having the final decision making authority regarding Samuel's medical care and education. The Father was granted restricted visitation on alternate weekends and

alternate Thursday evenings, with no overnights, and was ordered to pay child support, and the parties were ordered to evenly divide any medical expenses of the minor child not covered by insurance.

4. On February 22, 2000, the Father filed a Motion for reconsideration of the pendente lite order which was denied. On May 24, 2000, the Father filed a motion to amend and counterclaim for physical custody of the minor child, a motion for temporary physical custody of the parties' minor child, a motion to compel discovery, and a motion for contempt alleging that the Mother had failed to consult with him about the child's educational and medical needs. On June 14, 2000, the Mother filed a motion for sanctions and attorneys fee, a motion to restrain the Father, a motion for temporary custody, and a motion for psychological evaluations. On August 16, 2000, the court denied a transfer of temporary custody to father, granted his motion to amend, denied contempt, and Plaintiff agreed to respond to Defendant's discovery requests. The mother's motion for sole custody was to be heard at a later date and her motion for psychological evaluations was dropped and the restraining order was denied. On August 4, 2000, the Father filed a motion for standard visitation. The Mother filed a Rule to Show Cause relating to the Father's failure to pay his portion of the uncovered medical expenses and a motion to compel discovery responses.

5. On October 10, 2000, the Court granted the Mother's motion to compel, denied the Mother's motion for sole custody, but clarified the duty of consultation, and granted the Father's motion for standard visitation allowing the Father to visit every other weekend on an overnight basis with the first and third visitation periods in Brevard and the second visitation period in Hilton Head

until the child reached eighteen months old and thereafter visitation in Hilton Head.

6. On October 24, 2000, the Court heard the Mother's Rule to Show Cause why the Father should not be held in contempt for failure to pay one-half of the uncovered medical expenses incurred by the parties for the benefit of their minor child, Samuel Arnal. The Father was found to be in wilful contempt of the temporary order entered on February 14, 2000, and was ordered to pay $1,000.00 of the Mother's attorneys fees and his portion of the uncovered medical expenses and his portion of the therapy bills within seven (7) days of the date of the hearing.

7. The Mother filed another Rule to Show Cause why the Father should not be held in contempt for failing to respond to discovery requests in accordance with the Court's order dated October 23, 2000, and for again failing to pay his portion of the uncovered medical expenses. On February 16, 2001, an Order was entered denying contempt but requiring the Father to pay the outstanding uncovered medical expenses within ten days of the date of the order and for Plaintiff to be more specific in her discovery requests after which Defendant should fully respond thereto; attorneys fees and costs were held in abeyance until the final hearing.

8. On February 14, 2001, the Mother filed a Motion for Change of Visitation, *pendente lite*, because the minor child had been suffering illnesses since the Father had been granted overnight visitation with travel, and an order was entered granting her motion and requiring the father to visit with the child in Brevard, North Carolina, until a final order was entered.

9. On March 7, 2001, the Mother filed a motion to hold the Father in contempt, to strike his pleadings, to vacate the court's prior order, and to award legal fees and costs, based on allegations that the Father had committed perjury and perpetrated a fraud on the Court by falsely representing to the Court and to the Mother and her counsel and testifying falsely that certain documents he refused to provide were protected by confidentiality agreements which resulted in Judge Spruill's Order requiring an in camera inspection of allegedly confidential documents, extensive travel and depositions by counsel for the Mother to discover the truth, and other time incurred by the Mother's counsel. The Mother also filed and served a motion to compel the Father's appearance at his deposition and for sanctions. The motions were heard on April 4, 2001, at which time the Father was held in contempt, ordered to produce documents, ordered to appear at his deposition, and ordered to pay $10,000 to the Mother for attorneys fees and costs within fifteen days of the date of the hearing. The Court found that the Father failed to properly comply with the Mother's Request for Production; that he misled the Mother and her counsel with regard to the existence of confidentiality agreements; that he had no privilege or right to refuse to answer questions about the various companies and assets at issue in this case; and that the process of discovery had been abused by the Father in this case. The issue of the remainder of the requested fees and the total fees incurred for all motions, including the motion for sanctions, was held in abeyance to be determined by the Court at the hearing on the merits.

10. On April 18, 2001, the Mother filed a Motion to Strike, for Sanctions, and Motion *in Limine* and For

Attorneys Fees and Costs based on the Father's continued refusal to respond to discovery requests, refusal to obey the orders of this Court, and his fraudulent scheme to hide assets.

11. At the commencement of the trial, the Father and Mother entered into an agreement for the Mother to have sole custody of Samuel Arnal, the minor child of the parties. The agreement was placed on the record and became an order of this Court as each party entered into this agreement voluntarily and knowingly, each was represented by competent counsel, and neither party was under the influence of alcohol, drugs, or duress.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the pleadings, testimony of the parties and witnesses, exhibits, argument of counsel, and other documents on file, the Court makes the following findings of fact and conclusions of law:

12. The Father is a citizen and resident of Beaufort County, South Carolina, and has been so for more than one year prior to the commencement of this action.

13. The Mother is a citizen and resident of the County of Transylvania, North Carolina. The Mother is a beneficiary of an intervivos trust which purchased a home in Brevard, North Carolina, in 1999. As set forth and contemplated by the Court in the pendente lite order issued after the hearing on January 5, 2000, the Mother and the minor child of the parties moved approximately two weeks after the hearing to the home in Brevard, North Carolina, and have been living there since that time.

14. The parties were lawfully married to each other on April 29, 1995, in Beaufort County, South Carolina, and are now, and have ever since been, husband and wife. One child has been born of this marriage, to wit: Samuel Arnal, born July 7, 1999, in Atlanta, Georgia. No other children have been born of this marriage and none are expected.

15. This Honorable Court has jurisdiction over the subject matter hereof, the parties hereto, and the minor child.

Divorce

16. I find that the parties have been living separate and apart without cohabitation for a period in excess of a year and that there is no collusion between the parties. The Mother is entitled to and is granted a divorce on the grounds of separation for more than one (1) year.

Name Change

17. I find that the Mother shall be permitted to resume her maiden name of Laura Lawton Stone Fraser. The Mother does not seek this name change for the purpose of defrauding creditors.

Child Custody

18. The parties' minor child, Samuel Arnal, is now approximately 23 months old and has been diagnosed with Down syndrome.

19. The parties agreed and I find that it is in Samuel's best interest for the Mother to be granted permanent sole custody as she is better able to meet Samuel's needs

and is better able to provide proper medical, therapeutic, developmental, educational, emotional, and day-to-day care for the minor child.

20. The Mother has complete and total authority to make all decisions concerning the child, Samuel. This includes, but is not limited to, all medical and educational needs of Samuel. The Mother has the sole right to decide on physicians, treatment, therapy, and any other medical and educational needs of the child. The Father shall have the right to communicate directly with any health care professional and has the right to receive from them all reports regarding the child's care; the Mother shall notify the Father of all but routine medical appointments or treatment when the appointment is made; the Mother shall notify the Father of significant changes in treatment, therapy or medication when such is made. The mother is not required to notify the father of minor medical, nutritional, developmental and educational appointments.

21. Both parties shall give notice to the other of any emergency medical treatment within twelve (12) hours of such emergency.

Visitation

22. As the *Guardian ad* Litem correctly stated, the Court is to determine what is in the child's best interests, not the parties, nor what is most convenient for them.

23. Most of the doctors have recommended against extensive traveling for Samuel. The Mother has changed her lifestyle and is devoted to providing a stable and consistent routine for the child during the first few critical years of his life. The Mother is working part-time and, for

the most part, is able to work at home. She has hired a caregiver who is very experienced with special needs children to assist her on a part-time basis while she works at home. The Mother is following the advice of her child's pediatrician and the other medical providers.

24. Samuel's treating neurodevelopmental pediatrician is Dr. Michelle Macias, the Director of Developmental Pediatrics in the Division of Genetics and Developmental Pediatrics at the Medical University of South Carolina. Dr. Macias is a highly respected neurodevelopmental pediatrician who has examined Samuel on several occasions and has performed two developmental evaluations which were used by Samuel's therapists to structure his therapy sessions and evaluate his progress.

25. Dr. Macias' recommendations were based on her experience, training, and Samuel's developmental progress and potential, not on the genetic aspects that were addressed by the father's expert, Dr. Spence, from Charlotte. Dr. Macias' concerns are developmental:

> Children require routine in order to be able to predict their environment, and frequent travel can be detrimental to their developmental and behavioral progress. A child such as Samuel with developmental delay will have more difficulty with transitions and will experience separation anxiety to a greater degree than a normal child . . . In my professional opinion based upon my research and experience, I can state with a reasonable degree of medical certainty that young children with Down syndrome need structure and routine to a greater degree than a child without this type of disability. Samuel is in good health, but in terms of behavioral and developmental needs, I would recommend one main environment

> be maintained without frequent travel requiring greater that [sic] 1 hour travel time . . . Structure and routine lower the stress level and allow the child with Down syndrome to concentrate his energy on developing physically and mentally. The lack of change and decrease in stress will provide the child with an environment in which he can develop to his full potential.

26. The Father's expert, Dr. Siegel, is also a developmental pediatrician and practices at the University of South Carolina School of Medicine in Columbia. During his testimony, Dr. Siegel agreed with Dr. Macias' recommendations for visitation.

27. Even Dr. Spence, the Father's expert geneticist, testified that the stress of the travel and the change in environment could cause illness and the illnesses could result in lost therapy time. Furthermore, he did not disagree with the visitation plan worked out by the other doctors and did not feel that it would harm Samuel. Dr. Spence stated that faced with two differing medical opinions, he would pick the more conservative or cautious approach.

28. Dr. Jack Warner, who has been a board certified pediatrician since 1961 and is a Down syndrome specialist having treated approximately 9,000 children with Down syndrome, evaluated Samuel and recommended no overnights, no lengthy periods away from his mother, and no lengthy travel until he is developmentally more mature at which time Samuel will be better able to communicate his needs and will be able to adjust to changes in his environment more easily. In Dr. Warner's opinion, while it is important for Samuel's father to be involved with Samuel, it is also important for Samuel's routine to be maintained

while he is very young so that he does not become stressed and then sick. In Dr. Warner's opinion, periods of stress most likely will cause Samuel tc regress in his development and this regression most probably will cause permanent losses to the child, preventing him from reaching what would have been his true mental potential.

29. Dr. Allen Lieberman is a Charleston pediatrician and environmental specialist who was the former Director of the Vince Mosley Diagnostic Center of the South Carolina Department of Mental Retardation, was a former Medical Director of the Ladson Center for Mental Retardation, received an award regarding Down syndrome children from the South Carolina Association for Retarded Children, and who in the past and currently treats children with Down syndrome. Dr. Lieberman evaluated Samuel and recommended no overnights until Samuel is developmentally, as opposed to chronologically, two years of age because babies with Down syndrome are not as adaptable and change causes stress and anxiety.

30. Dr. Myers, Samuel's pediatrician but not an expert on Down syndrome, testified that Samuel should have no overnights until he is developmentally twelve to eighteen months old when his immune system is more mature, he has comprehension of time, and he is able to verbalize his needs. Samuel's most recent evaluation by a developmental pediatric specialist showed him to be developmentally at age 7 to 9 months.

31. The Guardian *ad litem* did an extensive review of the medical submissions, interviewed witnesses, and viewed the respective homes of the parties. He acknowledged the differences in the opinions of the medical experts in terms of Samuel's ability to travel and spend time

away from his mother, and testified that a conservative approach should be adopted to make certain that Samuel's needs are met. I agree with the Guardian *ad Litem* that a conservative approach should be taken with visitations.

32. Based upon the doctors' testimony and depositions, I do not believe there is a threat to Samuel's health because of travel in and of itself. Because of his condition, I believe that at his age, he is more easily susceptible to infection, stress and tiring. This concern must be balanced against the need to bond with his father. Both parents are needed in Samuel's life.

A. Until Samuel is 42 months old, visitation is as follows:

1. The Father shall have visitation with Samuel every other weekend.

a. The first weekend visitation of each month shall be in Brevard, North Carolina, from Friday, at 6:00 p.m. until Sunday at 6:00 p.m. The exchange shall occur at Brevard College. The child shall not be transported more than one (1) hour away from this location. The Father shall provide the Mother with proof, upon reasonable request, that no travel with the child was made exceeding a one hour distance from Brevard College.

b. The second weekend visitation of each month shall be in Hilton Head Island, South Carolina, from Friday at 6:00 p.m. until Monday at 6:00 p.m. The exchange shall occur in front of the Dillards store at Columbiana Mall, Columbia, South Carolina.

c. If there is a third weekend visitation in any month, it shall be in Brevard, North Carolina, from Friday, at 6:00 p.m. until Sunday at 6:00 p.m. The exchange

shall occur at Brevard College. The child shall not be transported more than one (1) hour away from this location. The visitation shall resume the next month with the first weekend visitation in Brevard and the second visitation in Hilton Head as set forth in paragraphs a and b above.

2. During the months of June and October when visitation is scheduled for Hilton Head Island, the father shall have one full week in Hilton Head Island beginning on Friday at 6:00 p.m. until the following Friday at 6:00 p.m; this is in lieu of, and not in addition to, the weekend visitation.

B. When Samuel is 43 months old. the schedule is the same except that both weekends with the father may be in Hilton Head Island from Friday at 6:00 p.m. until Monday at 6:00 p.m. The exchange shall occur in front of the Dillards store at Columbiana Mall, Columbia, South Carolina.

1. Also, an additional week long visitation will be added in February (the second scheduled visitation will be one week rather than the weekend).

C. Holiday visitation

1. Visitation during the holidays shall alternate; the father may exercise holiday visitation at Hilton Head Island prior to 43 months.

a. Christmas

The Christmas holidays are from December 19 until January 02.

Year 1 – 2001

(1) The mother shall have Samuel from December 19 at 2:00 p.m. until December 26 at 2:00 p.m.

(2) The father shall have visitation from December 26 at 2:00 p.m. until January 2 at 2:00 p.m.

(3) The pick-up and return shall be at Brevard College.

Year 2 – 2002

(1) The father shall have visitation from December 19 at 2:00 p.m. until December 26 at 2:00 p.m.

(2) The mother shall have Samuel from December 26 at 2:00 p.m. until January 2 at 2:00 p.m.

(3) The pick-up shall be at Brevard College and the return shall be at a mutually agreed upon location in Hilton Head.

b. Thanksgiving

The Thanksgiving holidays are from the Sunday before Thanksgiving until the Sunday after.

Year 1 – 2001

(1) The mother shall have Samuel from Sunday at 6:00 p.m. until Wednesday at 6:00 p.m.

(2) The father shall have visitation from Wednesday at 6:00 p.m. until Sunday at 6:00 p.m.

(3) The exchange and return shall be in front of Dillards at Columbiana Mall, Columbia, South Carolina.

Year 2 – 2002

(1) The father shall have visitation from Sunday at 6:00 p.m. until Wednesday at 6:00 p.m.

(2) The mother shall have Samuel from Wednesday at 6:00 p.m. until Sunday at 6:00 p.m.

(3) The exchange and return shall be in front of Dillards at Columbiana Mall, Columbia, South Carolina.

c. On Mother's Day, the child shall always be with the Mother. On Father's Day, the child shall always be with the Father. The visitation for Father's Day and Mother's Day shall be from Friday at 6:00 p.m. through Monday at 6:00 p.m. The exchange and return will be in front of Dillard's at Columbiana Mall, Columbia, South Carolina.

d. All other holidays not specifically addressed herein shall be spent in the care of the parent with whom the child is staying at that time.

2. Holiday visitation shall take precedence and pre-empts any regular scheduled visitation.

D. Conditions of Visitation

1. Father shall give the mother 72 hours notice of intent not to visit.

2. Father shall not give Samuel any medicine not authorized by the mother, unless there is a

medical emergency; the father shall not take the child to any other physician, therapist, medical professional or to any other person for treatment, therapy, clinic, or for any other purpose, without the express written consent of the mother or unless there is a medical emergency.

3. Father shall follow, to the extent possible, the child's normal routine as set forth by the mother. The father will accept and read correspondence from the mother relating to this routine.

4. Neither party shall talk disparagingly about the other or other members of either family around Samuel. Both parents shall encourage the child to love, respect and honor the other parent. Neither parent shall alienate, attempt to alienate or permit others to alienate the affections of the child from the other parent, grandparents or other family member or disparage or permit others to disparage the other parent to or in the presence of the child.

5. There shall be no overnight paramours to whom the party is not married while exercising custody or visitation.

6. Any provision regarding visitation may be modified in writing by agreement of the parties.

Child Support

33. The Father is able bodied, capable of being gainfully employed and is able to pay reasonable child support.

34. The South Carolina Child Support Guidelines defines [sic] gross income for a self-employed person as

"gross receipts minus ordinary and necessary expenses required for self-employment or business operation . . . this amount may differ from a determination of business income for tax purposes." SCCSG(3)(A)(4).

35. Based upon the testimony and exhibits, I find the parties' incomes for child support purposes as follows:

a. Father is imputed income of $9,060.62 per month.

   1. Plaintiffs Exhibit #61 shows that he is capable of making up to $95.00 per hour.

   2. Plaintiffs Exhibit #68 shows he listed income of $80,000.00 on a credit card application.

   3. I have arrived at his gross monthly income by imputing the ability to earn $70.00 per hour X 40 hour work week = $2,800 X 4.3 weeks in a month = $12,040 minus business expenses of $2,979.38 (*$35,550.83* ((year 2000 expenses)) ÷ 52 X 4.3) = $9,060.62.

b. Mother is imputed income of $5,012.40 per month.

   1. Ray McKay's testimony that income from trusts in 2000 was $40,456 + 52 weeks = $778 X 4.3 = $3,345.40 plus $1,667.00 = $5,012.40.

c. Mother shall pay for medical and dental insurance. This figure shall be placed in the guideline formula and she will receive credit.

d. Child care costs of $1,000.00 by mother shall be placed in formula.

e. Because there are extraordinary medical costs that may fluctuate month to month or year to year, these should not be placed in the formula.

36. Thus, father's child support obligation shall be, according to the guidelines, $1,564.00, to be paid one-half on the first of the month and one-half on the 15th day of each month, plus his pro-rata share of 64.4% of the uncovered medical expenses based upon the guideline percentage after the mother pays the first $250.00 in uncovered medical expenses annually. The Mother shall send the Father an itemization of uncovered medical expenses on a monthly basis, and the Father shall pay his portion of the expenses within fourteen (14) days after receiving the itemization. The first $250.00 shall be calculated commencing as of the filing of this order and annually on that date thereafter. Educational expenses have not been addressed as Samuel is only 23 months old.

37. Mother shall apply for medicaid and investigate and apply for any other financial assistance available.

38. Each party is to maintain life insurance for twenty (20) years in the amount of One Million ($1,000,000.00) Dollars naming the other parent as beneficiary to hold in trust for Samuel's benefit. The parties shall obtain the life insurance within sixty (60) days of the date of this order, shall timely pay all premiums, and shall provide each other with proof thereof and proof of the existence of said policies upon reasonable request.

Equitable Division

39. I have identified the following items as marital property (*see* §20-7.473):

a. Boozer-Arnal property

1. Includes lot that was sold.

2. Excludes A 38-4.

b. Myrtle Beach Entertainment

c. Heritage Tent Company – Defendant's Exhibit 29, #13

d. Bee Blessed Honey – Defendant's Exhibit 29, #14

e. 1st Union – Defendant's Exhibit 29, #7

f. Bear skin rug – Defendant's Exhibit 29, #20

g. Steuben crystal – Defendant's Exhibit 29, #21

h. Gator ramp – Plaintiff's Exhibit 52, #7

i. Antique gun – Plaintiff's Exhibit 52, #6

j. Table – Plaintiffs Exhibit 52, #10

k. Desk – Plaintiff's Exhibit 52, #10

l. Tiffany pearl earrings – Plaintiffs Exhibit 52, #15

m. 1999 Mercedes – Defendant's Exhibit 29, #17

n. Washer/dryer – Defendant's Exhibit 29, #18

o. Chair – Defendant's Exhibit 29, #19

p. Pick-up truck – Defendant's Exhibit 29, #23

40. Valuation – *See* §20-7-473

a. I accepted the values given by witness Keenan on the Boozer-Arnal property.

b. To assign any monetary value at this time to Myrtle Beach Entertainment would be speculative.

c. I have accepted the values listed on Plaintiff's Exhibit #52 and Defendant's Exhibit #29 for the remainder of the items.

41. Division

1. I have applied the factors listed in §20-7-472 and relevant case law to divide the property as follows:

A. The Mother shall have possession and title to the property listed on numbers f, g, l, m, n, and o above. The Tiffany pearl earrings shall be delivered by the Father to the Mother by hand-delivery or by certified mail, return receipt requested, within ten (10) days of the date of this order.

B. The Father shall have possession and title to the property listed on numbers a, b, c, d, e, h, i, j, k, and p above.

2. I did not award the Mother an interest is [sic] numbers a and b because I do not find that she made any significant direct or indirect contribution to their acquisition and upkeep.

3. I determined that "6 Oaks" was non-marital.

a. This was a corporation created prior to the marriage.

b. The Mother acquired her shares of stock prior to the marriage.

c. The Defendant did not prove that any of his efforts increased the value of the property to create a special equity.

4. Any other personal property that has already been divided is to remain with the party having possession.

Guardian *Ad Litem* Fees

42. I find that the Guardian ad Litem fee of $23,374.83 to be reasonable.

a. The fee will be paid as follows:

1. Father – $15,187.42

2. Mother – $8,187.41

43. I reached these figures based upon the following reasoning:

a. Both parties should equally bear the Guardian ad Litem fees up to the date of trial.

b. I believe the issue of visitation was tied primarily because the Father would not accept the Guardian ad Litem's recommendations.

1. Thus, I believe that it is fair to require him to be responsible for the Guardian ad Litem's fees at trial ($7,000.00).

c. These fees shall be paid within 60 days of the date of this order.

Attorneys Fees

44. The Father is ordered to pay the Mother $65,000.00 for attorneys fees.

a. This does not include, and is in addition to, the $10,000.00 that he has been ordered to pay by prior order.

2. The Father shall also continue to pay the balance of the $1,000 award as set forth in the Order entered November 15, 2000.

45. Analysis

a. Whether to order attorneys fees *E.D.M. v. T.A.M.*, 415 S.E.2d 812 (1992)

1. Parties ability to pay own fee

a. Both parties have the ability to pay their own fees.

2. Beneficial results obtained by attorney

a. The Mother prevailed on the major issues.

3. Parties respective financial conditions

a. In light of the equitable division, the Father is in a superior financial condition.

4. Effect of the fee on each party's standard of living

a. Each party's standard of living would be affected, but I believe that it would be unfair for the Mother to have to pay the majority of her attorneys' fees since most of the protracted nature of this litigation was precipitated by the Father.

b. Amount of attorneys fees – *Glasscock v. Glasscock*, 403 S.E.2nd 313 (1991).

1. Nature, extent, and difficulty of services rendered, and

2. The time necessarily devoted to the case

a. This was not a complex case factually. The case became complex primarily because of the Father. He has no one to blame but himself for the fee in this case. He was not forthright during discovery. Giving him the benefit of the doubt regarding the existence of confidentiality agreements, his "misunderstanding" as opposed to being untruthful, led to much more discovery than would have been necessary. He pursued custody until the morning of the trial, and whether because of another misunderstanding or ignorance, apparently thought custody was at issue at the end of the trial. By necessity, the Mother had to prepare for any issue the Father raised. At no time could she be certain that the Father had abandoned a claim until the trial was actually completed.

3. Counsels' professional standing

a. Both of the Mother's counsel enjoy a good reputation in the legal community.

4. Contingency of compensation

    a. The Mother's counsel will be paid regardless of this award, but it would not be fair to require her to pay the full amount.

5. Beneficial results obtained

    a. Mother prevailed on most issues.

6. Customary legal fees

    a. I find these fees reasonable.

    b. The Father shall pay these fees within 120 days of the signing of this order.

Restraining Order

46. The parties shall be mutually restrained from harassing each other in any way whatsoever, including without limitation, from causing or provoking emotional distress during the exchange of the child.

Now, therefore, it is hereby

ORDERED ADJUDGED AND DECREED that the Mother is granted a divorce *a vinculo matrimonii* from the Father; it is further

ORDERED that the Mother is awarded the complete care, custody and control of the minor child of the parties, with the Father granted structured visitation rights as set forth above. The provisions regarding custody and visitation set forth in paragraphs 20, 21, and 34, are incorporated and ordered as if set forth verbatim herein; it is further

ORDERED that the Father shall pay to the Mother $1,564.00 per month, to be paid one-half on the first of the month and one-half on the fifteenth day of each month, commencing on the date of entry of this Order, and payable on the 1st and 15th day of each month thereafter; it is further

ORDERED that the Father shall pay his pro-rata share of 64.4% of the uncovered medical expenses within fourteen (14) days after receiving an itemization of uncovered medical expenses from the Mother; it is further

ORDERED that the Mother shall pay for medical and dental insurance for the minor child; it is further

ORDERED that both parties are to maintain life insurance for twenty (20) years in the amount of One Million ($1,000,000.00) Dollars naming the other parent as beneficiary to hold in trust for Samuel's benefit. The parties shall timely pay all premiums and shall provide each other with proof thereof and proof of the existence of said policies upon reasonable request; it is further

ORDERED that both parties are barred from any alimony or support; it is further

ORDERED that the Father shall pay $15,187.42 of the Guardian *ad Litem*'s fees within 60 days of the date of this order. The Mother shall pay $8,187.41 of the Guardian *ad Litem*'s fees within 60 days of the date of this order; it is further

ORDERED that each party is awarded property as set forth herein; it is further

ORDERED that each party is ordered to pay his or her on personal indebtedness. Father is solely responsible

for any debts personally incurred by him, including but not limited to his professional debts; it is further

ORDERED that both parties shall be mutually restrained from harassing each other in any way whatsoever, including without limitation, from causing or provoking emotional distress during the exchange of the child; it is further

ORDERED that the Father shall pay the Mother $75,000.00 within 120 days of the date of this order as and for attorneys fees and shall pay the outstanding amount of attorneys fees due as set forth in the order entered on November 15, 2000; it is further

ORDERED that the Mother is granted the right to resume her maiden name of Laura Lawton Stone Fraser and she shall henceforth be known as and called LAURA LAWTON STONE FRASER.

AND IT IS SO ORDERED.

/s/ R. S. Armstrong
ROBERT S. ARMSTRONG
PRESIDING JUDGE
FOURTEENTH JUDICIAL CIRCUIT

Beaufort, South Carolina

This 09 day of October, 2001.

[SEAL]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

(803) 734-1080
FAX (803) 734-1499

March 7, 2007

Mr. David Emil Arnal
904 Park Ridge Circle
Marietta, GA 30068

Re: Arnal, David v. Fraser, Laura – Opinion No. 26253

Dear Mr. Arnal:

The Court has issued the following order on your Petition for Rehearing:

"Petition for rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

Justice John H. Waller, Jr.,
not participating.

March 7, 2007."

The remittitur is today being forwarded to the lower court.

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

DES/jjp

cc: Donald Bruce Clark, Esquire
Susan Rosen, Esquire
Robert Rosen, Esquire
Ralph E. Tupper, Esquire

STATE OF SOUTH CAROLINA) IN THE FAMILY COURT
COUNTY OF BEAUFORT) No. 99 DR 07 1608

LAURA LAWTON ARNAL,
Plaintiff,
versus
DAVID EMIL ARNAL,
Defendant

TRANSCRIPT
OF
RECORD

Beaufort, South Carolina
February 10, 2003

BEFORE:

HONORABLE ROBERT S. ARMSTRONG, Judge

APPEARANCES:

For the Plaintiff: SUSAN C. ROSEN, Esq.
ROBERT ROSEN, Esq.

For the Defendant: SALLY CALHOUN, Esq.

Reporter: TIMOTHY NICHOLAS

HARRIET P. BENNETT
Reporter, Ninth Judicial Circuit
P. O. Box 1575
Mt. Pleasant, S. C. 29465

* * *

[12] LAURA LAWTON FRASER, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSEN:

Q. Would you state your name, please?

A. Laura Lawton Fraser.

Q. And where do you reside, maam?

A. At 735 Still Ranch Road, Brevard.

* * *

[56] MR. ARNAL ON CROSS

Q. And where are you living?

A. I'm living at 311 East DeRenne Street in Savannah, Georgia.

* * *

STATE OF SOUTH CAROLINA) IN THE FAMILY COURT
COUNTY OF BEAUFORT) 2003-DR-07-183

DAVID EMIL ARNAL)
PLAINTIFF,)
VS.)
LAURA LAWTON FRASER)
DEFENDANT)

SUMMONS

(Filed FEB 10, 2003)

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, (which was filed in the Office of the Clerk of this Court on the 10 day of February, 2003) and to serve a copy of your answer to the Complaint upon the subscriber at 920 Bay Street, Ste. 25, Beaufort, S.C. 29902 within 30 days after service. If you fail to answer the Complaint within that time, the Plaintiff will apply to the Court for the relief demanded in the complaint.

/s/ Sally G. Calhoun
Sally G. Calhoun
920 Bay Street
Beaufort, S.C. 29902
(843) 522-3875

Beaufort, S.C.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE FAMILY COURT) 2003-DR-07-___
DAVID EMIL ARNAL, PLAINTIFF, VS. LAURA LAWTON FRASER, DEFENDANT	)))))))
	COMPLAINT (Filed FEB 10, 2003)

The Plaintiff complaining of the Defendant would show:

1. The parties were man and wife but divorced pursuant to the order of The Honorable Robert S. Armstrong dated October 9, 2001.

2. That the parties divorce decree granted custody of the parties' child to Defendant-mother and set child support at $1,564.00 based upon the court's imputing monthly income to the father of $9,060.62.

3. That there have been substantial changes in circumstances since the parties divorce decree which warrant a decrease in child support.

4. That the substantial changes in circumstances include, but are not limited to, a substantial decrease in Plaintiff's income. Although Plaintiff never earned or was able to earn the amount imputed to him in the parties' divorce decree and that amount is presently on appeal, Plaintiff s real income has substantially decreased since October, 2001. Plaintiff is further informed and believes that there have been substantial changes in Defendant's income which would result in a decrease of his child support.

5. Due to the substantial decrease in Plaintiffs income, he has been forced to find a salaried job. He has been offered $85,000 per year which is substantially lower than the income upon which his child support obligation was computed but a substantial improvement from his present income. He is informed and believes he is entitled to a recomputation of child support and decrease therein both *pendente lite* and permanently.

6. The decrease in Plaintiff's income with his huge child support obligations and other fees awarded in the parties divorce decree forced him to declare bankruptcy since the parties divorce..

7. On information and belief, Plaintiff's new job will offer health insurance superior to that carried by the Defendant for coverage of the parties' child Samuel. Plaintiff asks that the court shift the burden of health insurance coverage to him as soon as he is eligible for same and that he be given credit in the child support calculation for the part of the premium attributable to coverage for the child.

8. Plaintiffs new job will entail his moving to Atlanta, Georgia. His visitation with Samuel requires the parties to meet half way which is now at the Columbiana Mall. Plaintiff asks that a half way point be designated for exchanging the child for visitation with the father in Atlanta, Georgia *pendente lite* and permanently. Plaintiff believes that this is the Commerce, Georgia Exit on Interstate Highway 85.

9. Plaintiff is forbidden in the divorce decree to take the child who has Downs Syndrom [sic] to see any doctor. He asks that he be given the right to have the child examined by a geneticist and a developmental pediatrician once a

year to satisfy himself that the child is developing at a satisfactory pace, to advise him how to help his child reach his maximum potential and to give him peace of mind that the child is receiving all the care he needs. Plaintiff is not satisfied at his child's speech development and feel [sic] it should be his right and duty to inquire with other than those professionals the wife is using to check to see if anything else could be done to assist him. Plaintiff accepts that the custodial mother has the last word in health care, but this would allow a safety net for the child so that if anything is grossly out of what it should be, the Plaintiff would be informed by an impartial professional and would be able to seek judicial intervention. Plaintiff feels that this safeguard is especially needful in this case where the child is not normal and the father would not always be able to determine by himself what, if anything, needs to be corrected.

10. The Defendant has never been willing to work things out voluntarily and, on information and belief, will not agree to a computation of child support so that he believes he should be entitled to attorney fees and costs of this action. Defendant-mother has ample resources to pay her attorneys and Defendant asks that she be barred from receiving further attorney fees and costs in this action.

11. Plaintiff needs discovery in order to ascertain Defendant actual income and resources.

Wherefore, Plaintiff prays for the following relief:

1. Decrease in child support,

2. An order shifting the responsibility for health insurance for the parties' minor child to him,

3. Discovery,

4. Attorney fees and costs.

Respectfully submitted,

/s/ Sally G. Calhoun

Sally G. Calhoun
920 Bay Street
Beaufort, S.C. 29902
(843) 522-3875
FAX: (843) 522-1362

Beaufort. S.C.

STATE OF SOUTH CAROLINA	) IN THE FAMILY COURT
	) IN THE FOURTEENTH
COUNTY OF BEAUFORT	) JUDICIAL CIRCUIT
	) CASE NUMBER
	) 2003-DR-07-183
DAVID EMIL ARNAL,	)
	)
Plaintiff,	) **SECOND AMENDED**
vs.	) **AND SUPPLEMENTAL**
	) **ANSWER AND COUN-**
LAURA LAWTON FRASER,	) **TERCLAIM**
	)
Defendant.	)

The Defendant, answering the complaint herein and asserting her counterclaim, alleges and states as follows:

1. The Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. The Defendant admits the allegations contained in Paragraphs 1 and 2 of the Complaint.

3. The Defendant denies the allegations contained in Paragraphs 3, 4, 6 and 10 and demands strict proof thereof.

4. Answering the allegations contained in Paragraph 5, the Defendant has insufficient information to admit or deny this paragraph and therefore denies same and demands strict proof thereof.

5. Answering the allegations contained in Paragraph 7, the Defendant has insufficient information to admit or deny this paragraph and therefore denies same and demands strict proof thereof.

6. Answering the allegations contained in Paragraph 8, the Defendant admits that the Plaintiff is living in Atlanta, Georgia, but denies the remaining allegations contained in Paragraph 8 and demands strict proof thereof.

7. Answering the allegations contained in Paragraph 9, the Defendant admits that the Plaintiff is forbidden by the Divorce Decree to take the child who has Downs Syndrome to see any doctor and alleges that this matter is *res judicata* and has been determined by the Court. The Defendant denies the remaining allegations of that paragraph and alleges that it fails to state a claim and demands strict proof thereof.

8. Answering the allegations contained in Paragraph 11, the Defendant denies the allegations contained in this paragraph and demands strict proof thereof. Defendant alleges that the Plaintiff is not entitled to discovery on any issue which is *res judicata* and on which he has failed to state a claim.

FURTHER ANSWERING THE COMPLAINT AS A COUNTERCLAIM THERETO:

9. The Defendant re-alleges the allegations contained in Paragraphs 1 through 8 of the Answer as if set forth herein.

10. The Defendant alleges, that the Plaintiff has failed and refused to obey orders of this Court, both temporary and permanent, which require him to pay child support; that there has been no change of circumstance that would warrant a reduction in child support. There is, however, a change in circumstance that warrants an

increase in child support and an increase in support for the minor child's educational and medical expenses.

11. This Court issued an Order on October 17, 2001, in Case Number 99-DR-07-1608, which granted the Defendant sole custody, and granted the Plaintiff visitation of the parties' minor child, Samuel, every other weekend. One of the weekends was ordered to be in Brevard, North Carolina, where the Plaintiff lived, and one of the weekends was ordered to be in the Hilton Head, South Carolina area, were [sic] the Defendant lived. Samuel has been diagnosed with Down syndrome and is on a strict regimen of medication.

12. Since the issuance of this Court's October 17, 2001, Order, there have been several material changes in circumstance which warrant a modification in this Court's Order as it relates to the Plaintiff's visitation. The changes in circumstance are as follows:

a. Plaintiff has married Marie Traylor, who has been accused of abusing her son, Ben, from her prior marriage to Mell Traylor. Ben is fearful of Marie and, at his request, is currently not living in her home, but at the home of her parents. He has requested that his father obtain custody of him, and that his mother receive supervised visitation. There is currently an unresolved custody case pending between Marie Traylor and Mell Traylor.

b. Plaintiff has moved from Hilton Head Island, South Carolina, to Atlanta, Georgia, and Defendant and Samuel have moved temporarily to Hilton Head Island.

c. Plaintiff has refused to abide by this Court's prior Order and has been in contempt 6 times.

d. Plaintiff has refused to properly administer Samuel's medication, as this Court's Order requires him to do, which has caused Samuel's medical condition to worsen.

e. Plaintiff has become more angry at the Defendant, causing visitation exchanges to become much more traumatic for Samuel, including one incident which resulted in the police becoming involved.

f. The minor child's educational expenses have increased. Plaintiff refuses to contribute to the minor child's educational expenses, which did not exist at the time of the Final Order.

g. Plaintiff also refuses to contribute toward many of the therapies, medications, vitamins and supplements that are necessary for the minor child's medical condition and will not acknowledge that the vitamins and supplements are part of the child's medical expenses, which Plaintiff is required to contribute toward under the Amended Final Order in Case Number 99-DR-07-1608.

h. The Plaintiff's income has increased substantially during the pendancy of this action and the minor child's needs have also increased substantially. As a result, Defendant requests an increase in child support, retroactive to at least September 15, 2005.

i. As a result of a very large payment to Plaintiff and his company, Plaintiff now has huge

liquid assets. Plaintiff initially brought this action asking for a decrease in child support. Defendant alleges that Plaintiff should be responsible for all attorney's fees, expert fees and costs associated with this frivolous action.

13. The facts set out above constitute a material change of circumstance which warrants modifying this Court's prior Order as follows:

a. All of the Plaintiff's future visitation with Samuel should take place on Hilton Head (or Brevard, North Carolina, once the Defendant and minor child return to Brevard) and the times for visitation changed from Friday at 6:00 p.m. to Monday at 6:00 p.m., to Saturday from 9:00 a.m. to 6:00 p.m., Sunday from 9:00 a.m. to 6:00 p.m., and Monday 9:00 a.m. to 6:00 p.m., *pendente lite* and permanently, so that the Defendant can administer all of Samuel's medication.

b. Plaintiff's extended visitations, i.e., his one week visitations and Holiday visitations, should also be restricted to Hilton Head Island (or Brevard if the Defendant and minor child return), and the hours changed from 9:00 a.m. to 6:00 p.m.;

c. Plaintiff should be required to pay his proportionate share of all tuition and costs, including but not limited to computer classes, field trips, etc., of the minor child's educational expenses, *pendente lite* and permanently;

d. Plaintiff should be required to pay his proportionate share of all therapies, medications,

vitamins and supplements that the child's physicians deem necessary for his down syndrome condition, *pendente lite* and permanently.

e. Plaintiff should be required to provide the Defendant with his current home address(es), current home telephone number(s), current fax number(s), and current cellular telephone number(s), as well as all temporary address(es) and telephone number(s) during all times that the Plaintiff has visitation with the minor child, *pendente lite* and permanently.

f. Defendant should be awarded an increase in child support, retroactive to at least September 15, 2005, and requiring that said payments be paid through the Family Court together with the 5% surcharge fee, *pendente lite* and permanently.

g. The Defendant is informed and believes that she is entitled to an award against the Plaintiff for her attorney's fees and costs, *pendente lite* and permanently, and such other and further relief as the Court deems just and proper.

14. The Defendant is informed and believes that she is entitled to an order of discovery.

WHEREFORE, Defendant prays for an order:

1. Dismissing the Plaintiff's Complaint;

2. Awarding the relief requested in the Defendant's Counterclaim; and

3. And for such other relief as the Court deems just and proper.

ROSEN LAW FIRM, LLC

By: /s/ Susan C. Rosen

Susan C. Rosen
18 Broad Street, Suite 201
Charleston, SC 29401
(843) 377-1700

Samuel C. Bauer, Esquire
Robert S. Metro, Esquire
Bauer Law Firm
P.O. Box 7965
Hilton Head, SC 29938
843-842-5297

ATTORNEYS FOR DEFENDANT

Charleston, South Carolina
April 14, 2006

STATE OF NORTH CAROLINA	*File No.* 06-CVD0-532
TRANSYLVANIA County	In the General Court of Justice ☒ District ☐ Superior Court Division
Name of Plaintiff DAVID EMIL ARNAL	**CIVIL SUMMONS** ☐ **ALIAS AND PLURES SUMMONS** G.S. 1A-1, Rules 3, 4
Address	
City, State, Zip	*Date of Original Summons Issued*
VERSUS	*Date(s) Subsequent Summon(s) Issued*
Name of Defendant(s) LAURA LAWTON ARNAL (now FRASER)	

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	*Name And Address Of Defendant 2*
Laura Lawton Arnal (now Fraser)	

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the Petition of the Petitioner as follows:

1. Serve a copy of your written answer to the Petition upon the Petitioner or Petitioner's attorney within twenty (20) days after you have been served. You may serve your answer by delivering a copy to the Petitioner or by mailing it to the Petitioner's last known address, and

2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the Petitioner the Petitioner will apply to the Court for the relief demanded in the Petitioner.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)	*Date Issued*	*Time*
Eugene M. Car III P.O. Box 608 Hendersonville, NC 28793	10-31-2006	3:14 ☐ AM ☑ PM
	Signature /s/ Marsha M. [Illegible]	
	☑ Deputy CSC ☐ Assistant CSC ☐ Clerk of Superior Court	

☐ ENDORSEMENT	*Date of Endorsement*	*Time*
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.		☐ AM ☐ PM
	Signature	
	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk of Superior Court	

NOTE TO PARTIES: Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is $15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.

STATE OF NORTH CAROLINA COUNTY OF TRANSYLVANIA DAVID EMIL ARNAL, Plaintiff, vs. LAURA LAWTON ARNAL (now FRASER), Defendant.	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO.: 06 CVD 532 PETITION FOR REGISTRATION OF FOREIGN ORDER (Filed Oct. 31, 2006)

NOW COMES Plaintiff, and petitions the Court as follows:

1. Plaintiff is a citizen and resident of Marietta, Cobb County, Georgia.

2. Defendant is now a citizen and resident of Transylvania County, North Carolina, and has been a citizen and resident of said state and county for more than six months prior to the filing of this registration motion.

3. On October 9, 2001 (filed on October 17, 2001), an Amended Final Order was entered by the Honorable Robert S. Armstrong. Judge presiding before the Family Court for the Fourteenth Judicial Circuit in case no. 99-DR_07-1608; a certified copy of the Amended Final is attached hereto as Exhibit A.

4. Plaintiff (petitioner herein) desires to register this Amended Final Order in the District Court of Transylvania County, North Carolina, the county in which he is informed and believes that the Defendant now maintains a residence for herself and the minor child.

5. Upon information and belief, Defendant no longer maintain [sic] a permanent residence in Hilton Head Island, Beaufort County, South Carolina.

6. Plaintiff desires to register this Amended Final Order for both the purposes of modification and enforcement.

7. There is presently pending an action for modification of the Amended Final Order in the Family Court for the Fourteenth Judicial Circuit of Beaufort County, South Carolina; petitioner has requested dismissal of said action for modification based on lack of jurisdiction.

WHEREFORE, Plaintiff moves the Court that the Amended Final Order as entered in the Family Court for the Fourteenth Judicial Circuit in case no. 99-DR-07-1608 and which attached hereto as Exhibit A be registered as an order of this Court and be given full faith and credit.

This the 31st day of October, 2006.

BAZZLE & CARR, P.A.

/s/ Eugene M. Carr III
By: Eugene M. Carr III
State Bar No. 12891
P. O. Box 608
Hendersonville, N. C. 28793
(828) 697-4327

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON VERIFICATION

DAVID EMIL ARNAL, being first duly sworn, deposes and says: That he is the Plaintiff in the above entitled

action; that he has read or heard read to her [sic] the foregoing Petition for Registration and knows the contents thereof, and the same is true according to his own knowledge except as to those matters and things stated therein upon information and belief and as to those matters and things, he believes them to be true.

/s/ David Emil Arnal
DAVID EMIL ARNAL

Sworn to and subscribed before me
this the 24 day of October, 2006.

/s/ D. Grossman [SEAL]
Notary Public

My Commission Expires: 2/11/08

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

AFFIDAVIT OF SERVICE

This is to affirm that I have this date personally served LAURA LAWTON FRASER with a pleading entitled PETITION FOR REGISTRATION OF FOREIGN ORDER, File No: 06 CVD 532, IN THE GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION, County of Transylvania, State of N.C.

/s/ J. Gerald
Signature

Date: 11-13-06

Title: Deputy Sheriff

Sworn to and subscribed before me this 13 day of November 2006.

/s/ Sally G. Calhoun Notary Public
My Comm. expires: Mar. 31, 2012

[SEAL]

59

(2)

No. 06-1628

FILED

JUN 21 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DAVID ARNAL,

Petitioner,

v.

LAURA LAWTON FRASER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

DONALD B. CLARK
Counsel of Record
DONALD B. CLARK, LLC
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Counsel for Respondent

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Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, create a private cause of action in federal court to determine which of two conflicting state court child custody orders is valid, and if it does, are there conflicting state court child custody orders in this case?

II. Does the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B, create a private cause of action in federal court to determine which of two conflicting state court child support orders is valid, and if it does, are there conflicting state court child support orders in this case?

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FEDERAL STATUTES

28 U.S.C. § 1257(a) 1

Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A 2

Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B 2

STATE STATUTES

Uniform Child Custody Jurisdiction Act, S.C. Code Ann. §§ 20-7-782 to -830 (1985) 2

OTHER AUTHORITIES

Rule 205, South Carolina Appellate Court Rules 3

Rule 225, South Carolina Appellate Court Rules 3

BASIS FOR SUPREME COURT JURISDICTION

Petitioner seeks review of a decision of the South Carolina Supreme Court, *Arnal v. Fraser*, 641 S.E.2d 419 (S.C. 2007), pursuant to 28 U.S.C. § 1257(a). Respondent submits that such review is foreclosed by *Thompson v. Thompson*, 418 U.S. 174, 108 S.Ct. 513 (1988).

STATEMENT OF THE CASE

This litigation stretches back to an Amended Final Order filed in the family court in Beaufort County, South Carolina on October 17, 2001. (Pet. App. 37-62) Among other things, by that order Respondent Laura Lawton Fraser (Mother) was awarded sole custody of the parties' minor child, Samuel, and Petitioner David Arnal (Father) was ordered to pay child support.

The parties cross-appealed a number of issues, including the amount of visitation Father had been awarded, which the South Carolina Court of Appeals resolved in *Arnal v. Arnal*, 609 S.E.2d 821 (S.C. Ct. App. 2005). The South Carolina Supreme Court granted certiorari to address five issues from the Court of Appeals' decision and affirmed the Court of Appeals, with modification, in *Arnal v. Arnal*, 636 S.E.2d 864 (S.C. 2006).

While the first appeal was still pending, Father filed the current action (Case No. 2003-DR-07-183) in the Beaufort County family court on February 10, 2003. In his complaint, Father requested a reduction of his child support obligation and certain other relief. (Pet. App. 68-71) Mother counterclaimed for an increase in child support and certain other relief. (Pet. App. 72-78)

After Father filed the February 2003 action, numerous hearings were held to address motions and rule to show cause actions, primarily dealing with Father's intransigence in refusing to obey the Amended Final Order. Four orders subsequently issued in that action were the subject of a second appeal by Father, which was certified directly to the South Carolina Supreme Court. That appeal resulted in the South Carolina Supreme Court's decision filed on January 22, 2007, *Arnal v. Fraser*, 641 S.E.2d 419 (S.C. 2007).

In the second appeal, Father claimed, for the first time during the appeal, that the Beaufort County family court lacked subject matter jurisdiction over his own action when he filed it in February 2003, citing the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (PKPA). Father later expanded on this theory during the appeal by also claiming that the Beaufort County family court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act, S.C. Code Ann. §§ 20-7-782 to -830 (1985) (UCCJA).

In his ever evolving strategy, Father has now abandoned his UCCJA argument but has added in his petition to this Court a new claim that the Beaufort County family court also lacked subject matter jurisdiction under the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (FFCCSOA). Because this newly minted claim arose after the South Carolina Supreme Court issued its decision in the second appeal, it is of course not discussed in that decision.

After Mother filed her appellate brief, citing authority that the PKPA and UCCJA apply only when there are conflicting custody orders from different states, Father on

October 31, 2006 filed a petition in the district court for Transylvania County, North Carolina for registration of the October 17, 2001 Amended Final Order of the Beaufort County family court. However, the only relief Father sought in that action was that the South Carolina order "be registered as an order of this Court and be given full faith and credit." (Pet. App. 82) At the time Father filed this petition in North Carolina, Mother and the child had moved back to and been living in South Carolina for over two years.

In the second appeal, the South Carolina Supreme Court determined that the Beaufort County family court continued to have jurisdiction under both the PKPA and the UCCJA. *Arnal v. Fraser*, 641 S.E.2d 419, 421-422 (S.C. 2007). It nevertheless concluded that two of the appealed orders had affected Father's visitation while the issue of visitation remained a subject of the first appeal and that these were therefore void pursuant to Rules 205 and 225 of the South Carolina Appellate Court Rules. *Id.* 641 S.E.2d 419, 421-422.

Although as part of the second appeal Father made belated allegations about the residence of Mother and the child, no finding has ever been made by any court that either Mother or the child is a resident of North Carolina, or that either was a resident of North Carolina when Father commenced this action in South Carolina on February 10, 2003.

REASONS FOR DENYING THE PETITION

I. THE PARENTAL KIDNAPPING PREVENTION ACT, 28 U.S.C. § 1738A, DOES NOT CREATE A PRIVATE CAUSE OF ACTION IN FEDERAL COURT TO DETERMINE WHICH OF TWO CONFLICTING STATE COURT CHILD CUSTODY ORDERS IS VALID, BUT EVEN IF IT DID THERE ARE NO CONFLICTING STATE COURT CHILD CUSTODY ORDERS IN THIS CASE.

While understandably trying to avoid the appearance of doing so, Father asks the Court to overturn *Thompson v. Thompson*, 418 U.S. 174, 108 S.Ct. 513 (1988), which holds that the PKPA did not create a private federal cause of action to resolve conflicting state court custody orders. Indeed, Father goes a giant step further than that, asking the Court to directly intervene concerning a state *visitation* order he is unhappy with *even when there is no interstate conflict at all concerning that order.*

The only connection any court in North Carolina has ever had in this case is when Father belatedly tried to manufacture an interstate conflict by filing the petition in Transylvania County, North Carolina on October 31, 2006. (Pet. App. 79-84) This was more than three and a half years after Father had commenced the underlying litigation in Beaufort County in February 2003, long after the Beaufort County family court had issued the orders which were the subject of the second appeal, and long after Mother and the child had moved back to South Carolina. North Carolina has never accepted jurisdiction over any aspect of this matter, much less issued any orders in the case, conflicting or otherwise, and there is no reason to suppose it ever will.

Father's argument that "The PKPA and the UCCJA . . . were not enacted merely to resolve multistate jurisdictional

conflicts but also to prevent them from occurring in the first place," (Petition, p. 18) even if correct, could have no application where there is not now and has never been any multistate jurisdictional conflict to begin with. Father never encountered a jurisdictional conflict with Mother when he brought this action, so regardless of whether a secondary purpose of the PKPA and the UCCJA is to prevent multistate jurisdictional conflicts from occurring in the first place, such a prophylactic proved unnecessary in this case. Father is not attempting to use the PKPA *to prevent* a jurisdictional conflict, he is attempting to use it *to create* one.

As noted, it was Father himself who brought the present modification action of the Amended Final Order in South Carolina on February 10, 2003. (Pet. App. 67-71) Only after he failed to obtain the relief he wanted did Father raise the issue of South Carolina's jurisdiction under the PKPA and UCCJA. Declaring that South Carolina lacked jurisdiction under these circumstances would not only require the Court to overrule *Thompson*, it would require the Court to go much further. It would be an open invitation to disgruntled litigants to challenge state court custody orders in federal court after they had already voluntarily participated in the state court action and lost, even when there was no competing custody order issued by another state. Far from preventing jurisdictional disputes, this would present stunning vistas of new opportunity for parties such as Father to dream up phony ones as a standard feature of custody litigation strategy.

In *Thompson*, the petitioner hoped to better his chances of obtaining relief from the Court by carefully narrowing his request for federal court intervention "only in cases of an actual conflict between two state custody decrees . . . " 484 U.S. at 186, 108 S.Ct. at 519. The Court

unanimously rejected even that far more modest request, determining that Congress simply did not intend to grant such relief when it enacted the PKPA: "Instructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state-law questions that they have little expertise to resolve. That is a cost that Congress made clear it did not want the PKPA to carry." 484 U.S. at 186, 108 S.Ct. at 519. Yet here, Father asks the Court to play Solomon where there are *no conflicting custody orders at all*, choosing between an order from South Carolina and a *nonexistent* order from North Carolina. There is not even a case or controversy presented, only hypothetical questions. It is even clearer that saddling the federal judiciary with the burden of responding to such queries, however fascinating Father may find them to be, is a cost Congress did not want the PKPA to carry.

The fact that Father is asking for review by this Court rather than by a federal district court, as was requested in *Thompson*, is of course not a meaningful distinction. If the PKPA does not afford litigants the right to federal court review of state court judgments, then clearly that includes review in all federal courts: "Petitioner essentially asks that federal district courts exercise appellate review of state-court judgments. This is an unusual cause of action for Congress to grant, either expressly or by implication." 484 U.S. at 187, 108 S.Ct. at 520, footnote 5. The only avenue for review left open by the Court in *Thompson* is in its statement that "ultimate review remains available in this Court for truly intractable jurisdictional deadlocks." 484 U.S. at 187, 108 S.Ct. at 525. Quite obviously, if the facts in *Thompson* did not present a truly intractable jurisdictional deadlock, where there actually *were*

conflicting custody decrees issued by California and Louisiana, then there is no such intractable deadlock here, where there are no conflicting custody decrees at all.

II. THE FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS ACT, 28 U.S.C. § 1738B, DOES NOT CREATE A PRIVATE CAUSE OF ACTION IN FEDERAL COURT TO DETERMINE WHICH OF TWO CONFLICTING STATE COURT CHILD SUPPORT ORDERS IS VALID, BUT EVEN IF IT DID THERE ARE NO CONFLICTING STATE COURT CHILD SUPPORT ORDERS IN THIS CASE.

Father's argument based on the FFCCSOA is simply a reiteration of his argument based on the PKPA, merely substituting a different statutory provision for the PKPA, and the holding of *Thompson* applies with equal force and for the same reasons.

Not only did Father never raise the FFCCSOA in any court action in South Carolina, including the South Carolina Supreme Court, there is not even an allegation that there are conflicting interstate child support orders.

Just as with the PKPA, an examination of the FFCCSOA fails to reveal any intention, either express or implied, on the part of Congress to afford state court litigants a right to federal court review of conflicting state child support orders, but even if it did there are no conflicting state child support orders to be sorted out.

CONCLUSION

For the foregoing reasons, Mother respectfully requests that the Petition be denied.

Respectfully submitted,

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